IS WEST GERMANY'S 1975 ABORTION DECISION A SOLUTION TO THE AMERICAN ABORTION DEBATE?: A CRITIQUE OF MARY ANN GLENDON AND DONALD KOMMERS

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INTRODUCTION

Within the span of two years, the highest constitutional courts of two Western democracies reached almost diametrically opposed decisions on the issue of abortion. In 1973, the United States Supreme Court held in *Roe v. Wade*[1] that the constitutional right to privacy first articulated in *Griswold v. Connecticut*[2] extended to the right to choose to have an abortion. Under *Roe*, the right to abortion was left unrestricted during the first three months of pregnancy.[3] During the second trimester, until the point of viability, states could regulate abortion only to preserve the health of the woman.[4] In the last trimester a state could prohibit abortion, although it was not required to do so.[5] While several subsequent decisions have curtailed the broad abortion right articulated in *Roe*, most abortions remain legal in the United States.[6]

In contrast, the West German Federal Constitutional Court struck down legislation in 1975 because it failed to criminalize abortion in the first trimester.[7] The court determined that the state has an affirmative duty to protect the life of the fetus and decided that this duty could be fulfilled best through the use of criminal sanctions. As a result, abortion became illegal in West Germany except in a set of special circumstances (or *indications*) set out in the law.[8]

The existence of these two radically different decisions has spurred the interest of a number of scholars.[9] At the forefront of this comparative scholarship are Donald Kommers, a professor of law and government at the University of Notre Dame, and Mary Ann Glendon, a professor at Harvard Law School. Kommers is a leading comparativist of the legal systems of Germany

1. 410 U.S. 113 (1973).
2. 381 U.S. 479 (1965).
3. 410 U.S. at 161-62.
4. *Id.*
5. *Id.* at 163-64.
6. *See infra* notes 158-85 and accompanying text.
7. Judgment of Feb. 25, 1975, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, *translated in* John D. Gorby & Robert E. Jonas, *West German Abortion Decision: A Contrast to* Roe v. Wade, 9 J. MARSHALL J. PRAC. & PROC. 605 (1976).
8. *See infra* notes 46-77 and accompanying text. The constitutional court issued a new decision on abortion regulation in May 1993, which is discussed *infra* notes 120-49 and accompanying text.
9. *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES (1987); Winfried Brugger, *A Constitutional Duty to Outlaw Abortion? A Comparative Analysis of the American and German Abortion Decisions*, 36 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 49 (1987); Hartmut Gerstein & David Lowry, *Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court*, 25 EMORY L.J. 849 (1976); Gorby & Jonas, *supra* note 7, at 605; Donald P. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 B.Y.U. L. REV. 371; Douglas G. Morris, *Abortion and Liberalism: A Comparison Between the Abortion Decisions of the Supreme Court of the United States and the Constitutional Court of West Germany*, 11 HASTINGS INT'L & COMP. L. REV. 159 (1988); Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 563 (1991).

and the United States; he has written extensively on the West German abortion decision of 1975 and how it compares to the American system of abortion regulation.[10] Glendon specializes in comparative family issues and wrote *Abortion and Divorce in Western Law: American Failures, European Challenges*,[11] a comparative study of European and American abortion and divorce law. In their writings, Kommers and Glendon conclude that the German decision is morally and logically superior to *Roe* in its approach to abortion regulation and that the American abortion discussion can benefit from a close examination of the German decision. They argue that the West German abortion decision is legally sounder than *Roe* and suggest that the type of compromise reached as a result of the German decision is possible and desirable under the American legal system as well.

This Article is a critique of Glendon's and Kommers's position. I argue first that any application of the German decision or its rationale to the American context is impossible due to fundamental legal and social differences between the two countries. Second, I suggest that even if implementation of the German abortion system along the lines proposed by Kommers and Glendon were possible, it would be undesirable because the 1975 West German decision is flawed legally and morally and therefore does not provide a more principled alternative to *Roe*. In addition, while Kommers and Glendon attempt to cloak their conclusions in the neutrality of the comparative method,[12] I argue that their analyses are motivated more by a desire to conform to a traditional pro-life perspective than to seek a principled alternative to the parameters of the current abortion debate. For these reasons, I find their arguments unpersuasive.

I begin by examining the German abortion decision and its aftermath. I then discuss the current state of abortion law in unified Germany in order to show that the system of abortion regulation set up in West Germany as a result of the 1975 decision proved unworkable, even in the German context. Following a brief discussion of American abortion regulation, I lay out Glendon's and Kommers's positions and conclude with my own critical analysis of their arguments.

I
ABORTION REGULATION IN GERMANY

A. Abortion Regulation Before 1974

Abortion has been regulated by statute in Germany since 1851, when

10. *See, e.g.*, Donald P. Kommers, *Abortion and the Constitution: The Cases of the United States and West Germany*, *in* ABORTION: NEW DIRECTIONS FOR POLICY STUDIES 83 (Edward Manier, William T. Liu & David Solomon eds., 1977); Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255 (1977); Kommers, *supra* note 9.

11. *See* GLENDON, *supra* note 9.

12. For a brief discussion of the comparative method, see *infra* notes 300-03 and accompanying text.

abortion regulations first appeared in the Criminal Code of the Prussian States.[13] These regulations were adopted in their entirety in section 218 of the Criminal Code of the German Reich of 1871.[14] This law criminalized abortion and provided for prison sentences of up to five years for both the woman who underwent the abortion and the doctor who performed it.[15] The Prussian law did not allow for exceptions, even if the woman's life was in danger, although in special circumstances the sentence was reduced to six months.[16]

The statutory law regarding abortion remained unchanged for fifty years. During the period of the Weimar Republic (1919-1933), however, the law came under severe attack and various reform attempts were undertaken.[17] Many bills and proposals for reform were introduced into the parliament, including attempts to decriminalize abortions performed in the first trimester, but they all ultimately failed.[18] In 1927, the Reichsgericht, Germany's highest court during the Weimar Republic, recognized the medical indication, thus decriminalizing abortion in cases where the woman's life or health was endangered as a result of pregnancy.[19]

During the Nazi period, the Order for the Protection of Marriage, Family, and Motherhood of March 1943, determined that violations of section 218 should result in more severe criminal punishment than during the Weimar period.[20] Under the Nazi philosophy, abortions were viewed as "attacks on the vital energy of the people" or "attacks on race and heredity."[21] Abortions therefore were prohibited except where the woman's life was in danger or for "the prevention of hereditarily ill offspring."[22]

After 1945, when the laws of Nazi Germany ceased to exist, the abortion law in Germany returned essentially to what it had been during the Weimar Republic. Abortions continued to be prohibited, but exceptions were made for

13. Judgment of Feb. 25, 1975, BVerfG, 39 BVerfGE 1, 7 (F.R.G.), *translated in* Gorby & Jonas, *supra* note 7, at 613. For a good discussion of the history of Germany's abortion law before 1974, see Michael G. Mattern, *German Abortion Law: The Unwanted Child of Reunification*, 13 LOY. L.A. INT'L & COMP. L.J. 643, 653-60 (1991).

14. 39 BVerfGE at 7.

15. *Id.*

16. *Id.*

17. *See generally* Atina Grossman, *Abortion and Economic Crisis: The 1931 Campaign Against Paragraph 218, in* WHEN BIOLOGY BECAME DESTINY: WOMEN IN WEIMAR AND NAZI GERMANY 66 (Renate Bridenthal, Atina Grossman & Marion Kaplan eds., 1984).

18. 39 BVerfGE at 8.

19. *Id.* at 6 (citing Judgment of Mar. 11, 1927, Reichsgericht [RG], 61 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 242).

20. *Id.* at 7.

21. *Id.* at 9, *translated in* Gorby & Jonas, *supra* note 7, at 615.

22. 39 BVerfGE at 9, *translated in* Gorby & Jonas, *supra* note 7, at 615. The definition of "hereditarily ill" included all non-Aryan racial classifications. *See* Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State, in* WHEN BIOLOGY BECAME DESTINY, *supra* note 17, at 271, 273 (women targeted for abortion were those who were "negations of the 'Aryan' ").

situations where the woman's life or health was endangered.[23]

Between 1970 and 1974, several initiatives were made to reform the penal code generally and the abortion law specifically, but a law did not emerge from the German Parliament (Bundestag) until 1974. On June 18, 1974, as part of a general reform of German criminal law, the Bundestag enacted a new abortion law for West Germany[24] by a narrow margin (247-233).[25] In principle, the new sections 218-220 still prohibited abortion after the thirteenth day subsequent to conception (the approximate time of implantation of the fertilized ovum in the uterus).[26] However, the law also created a period of twelve weeks after conception during which abortion would be permitted if performed by a physician.[27] The law required the pregnant woman to undergo counseling, either by a doctor or by counselors at a special counseling center, in which she would be informed of available private and public assistance to help her while she carried her child to term.[28] An abortion in the first twenty-two weeks would not be punishable if the fetus was determined to be deformed or handicapped to a degree where it would be unreasonable for the woman to carry it to term (eugenic indication).[29] A pregnancy could be terminated at any time if it was a danger to the woman's health or life (medical indication).[30] Under the law, women were to be exempt from punishment unless they themselves performed the abortions. Doctors performing abortions in violation of the law, however, could face prison sentences of up to five years.[31]

Immediately after the Abortion Act was passed, it was challenged as unconstitutional.[32] At the request of the German state of

23. Mattern, *supra* note 13, at 656; Karen Crabbs, *The German Abortion Debate: Stumbling Block to Unity*, 6 FLA. J. INT'L L. 213, 218 (1991).

24. Abortion Reform Act of 1974, 1974 Bundesgesetzblatt, Teil I [BGBl. I] [Federal statute, Part I] 1297 (F.R.G.).

25. Hans Schueler, *Kippt Karlsruhe den Kompromiss? [Will Karlsruhe Topple the Compromise?]*, DIE ZEIT, July 3, 1992, at 3.

26. 1974 BGBl. I 1297.

27. *Id.*

28. *Id.* at 1298.

29. *Id.* at 1297-98.

30. *Id.* at 1297.

31. *Id.*

32. The jurisdiction of the German constitutional court (Bundesverfassungsgericht) is more limited in some areas than that of the United States Supreme Court and more expansive in others. The constitutional court can only decide constitutional conflicts; it is not a court of last appeal for nonconstitutional issues. However, it has broader jurisdiction than its American counterpart in areas that are relevant for this Article. For instance, the constitutional court is the arbitrator of conflicts between the highest sectors of the Federal Republic. In this jurisdictional category, the federal president, the legislature, and the executive may initiate a proceeding in the court. The court is responsible for supervising the correct constitutional balance of powers between the federal organs. The German court can also decide constitutional questions without requiring a real controversy or adverse parties before it. A procedure called *abstract judicial review* allows the constitutional court to decide a constitutional question at the request of a federal or state government or of one-third of the members of the Bundestag. Generally, this procedure is invoked when there are differences of opinion regarding the compatibility of federal or state laws with the Constitution. The German court also has powers of judicial review similar to those of the United States Supreme Court, although this power is limited to

Baden-Württemberg,[33] the constitutional court issued an injunction against section 218a (the twelve week criminal exemption), pending a decision by the court on the Act's constitutionality.[34] At the same time, 193 members of the Bundestag and the governments of five German states petitioned the constitutional court to review the constitutionality of the Abortion Act. The challengers invoked the special abstract review procedure under which either a state or one-third of the Bundestag may request constitutional review of a law before it has taken force.[35] The challengers argued that the new law violated the fetus's right to life guaranteed by Articles 2(2) and 1(1) of the German Constitution.[36] They contended first that Article 2(2) extends to unborn life, based on the intent of the framers, the beliefs of the majority of the public, and the history of German legal culture. In addition, they argued that Article 2(2) represents not only a negative right against the state but also an affirmative duty of the state to protect that right. This duty, they said, could be derived directly from Article 1(1).[37] The petitioners then insisted that the twelve week exemption in section 218a of the Abortion Act violated the state's duty to protect unborn life. Since there was a twelve week period in which the fetus had no rights and an abortion could be performed without even a showing of exigency, section 218a was an unconstitutional endorsement by the state of abortion in violation of the fetus's right to life. The petitioners also argued that criminal law creates ethical norms. The new law would rob the fetus of ethical value in the eyes of society, thereby violating Article 1(1) of the Constitution, which protects the dignity of the person. The petitioners also insisted that the required consultation provided for by the new law would not change minds effectively and therefore would not result in fewer abortions. In addition, the consultation requirement would place too great a burden on the states responsible for setting up the necessary agencies.[38]

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constitutional questions. Either a lower court or an individual may request a hearing before the constitutional court. If lower courts believe a law to be unconstitutional, they must present the question to the constitutional court. The constitutional court is the only judicial body empowered to declare a law unconstitutional. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 11-18 (1989).

33. The state of Baden-Württemberg is predominantly Catholic. Nomi Morris, *Tough Challenge for Germany—A Unified Abortion Law*, S.F. CHRON., Feb. 11, 1992, at A10.

34. Judgment of June 21, 1974, BVerfG, 37 BVerfGE 324 (F.R.G.); *see also* Judgment of Feb. 25, 1975, BVerfG, 39 BVerfGE 18 (F.R.G.), *translated in* Gorby & Jonas, *supra* note 7, at 605.

35. Kommers, *supra* note 9, at 392; *see supra* note 32.

36. Article 2(2) of the Grundgesetz provides that: "Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law." GRUNDGESETZ [Constitution] [GG] art. 2(2) (F.R.G.), *translated in* BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 14 (Press and Information Office of the Federal Government trans., 1987) [hereinafter BASIC LAW]. Article 1(1) states: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority." GG art. 1(1), *translated in* BASIC LAW, *supra*, at 14; *see also* 39 BVerfGE at 18-23.

37. 39 BVerfGE at 20.

38. 39 BVerfGE at 21-22.

The respondents in this case were the remainder of the Bundestag, the federal government, and the state of Nordrhein-Westfalen.[39] Respondents' arguments focused primarily on the issue of whether unborn life was legally equivalent to born life and on the practical effects of the new law. Their arguments also placed a far greater emphasis on the rights of the woman than did those of petitioners. The respondents began by relating the highly problematic history of illegal abortion in Germany. First, they argued, the pre-1974 abortion law did not serve effectively as an ethical norm because, due to its severity, prosecutions were rarely pursued.[40] The law had become a laughingstock and did not adequately protect unborn life. Second, the law had disparately affected poorer women who could not afford to travel abroad for abortions and who instead terminated their pregnancies in unregulated and often unsanitary and dangerous conditions. Therefore, criminal sanctions had not led to fewer abortions, only to more dangerous ones.[41] In contrast, the respondents argued, the twelve week exemption in the new law would cut down on illegal back alley abortions. Further, the consultations would focus on ways to make the continuation of pregnancy feasible by, for example, providing the woman with possibilities for assistance. In respondents' view, this would serve as a much more effective safeguard of developing life than would criminal sanctions.[42] The exemption thereby also expressed trust in the ability of women to make moral decisions and strengthened the woman's constitutional right to the free development of her personality.[43]

Finally, respondents urged the court not to value unborn life equally with born life. According to them, the word *everyone* in Article 2(2)[44] implies personhood. In every legal and social sense, they insisted, personhood begins with birth. Since a fetus was not a person, it should not have the legal value of

39. Since this petition did not present an actual case or controversy, these respondents were not respondents in the American sense. Essentially, the remainder of the Bundestag, the federal government, and Nordrhein-Westfalen opposed the petition and argued in favor of the new law. *Id.* at 23-24.

40. 39 BVerfGE at 28-29. The commentary accompanying the German Penal Code cites an average of only 300 convictions for an estimated 75,000 to 300,000 illegal abortions a year during the years immediately preceding 1973. 21 ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH KOMMENTAR 1293 (1982) (commentary to STRAFGESETZBUCH [StGB] [Penal Code] §§ 218-219d (F.R.G.)).

41. 39 BVerfGE at 29; *see also* 21 SCHÖNKE & SCHRÖDER, *supra* note 40, at 1293 (commentary to StGB §§ 218-219d).

42. 39 BVerfGE at 29-32.

43. 39 BVerfGE at 31 (citing GG arts. 1(1) and 2(1)). *See supra* note 36 for text of GG art. 1(1). Article 2(1) of the Constitution states that: "Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code." GG art. 2(1), *translated in* BASIC LAW, *supra* note 36, at 14. This clause functions like the American right of privacy, although it must always be balanced against other constitutional provisions. The provision for compliance with the "moral code" has never been the basis for a ruling by the constitutional court and is largely ignored. Interview with Georg Nolte, Professor of Comparative Law, Max-Planck Institute of Comparative & International Public Law, Heidelberg, Germany, and Visiting Professor in Spring 1992 at New York University School of Law, in New York, N.Y. (Apr. 9, 1992).

44. GG art. 2(2), *supra* note 36.

a person. The precise level of legal value the fetus should be accorded depended on its stage of development and against whom the value was being balanced. German legal and religious history showed that the fetus had always been valued differently—and less—than human life after birth. Respondents argued that, since the fetus was in an early stage of development during the first twelve weeks and because the woman had constitutional rights that needed to be weighed against the rights of the unborn, the twelve week exemption did not violate the state's duty to protect people's dignity.[45]

B. The Abortion Decision

Oral arguments were held in November 1974. On February 25, 1975, the constitutional court[46] issued its decision.[47] The court's decision essentially rejected respondents' arguments, though it did not fully embrace petitioners' views. The majority, over a rare published dissent signed by two judges[48] (one of whom was the only woman on the court), crafted its own solution to the problem of abortion. The court began by holding that Article 2(2) protects the developing fetus as an independent legal interest, though it was careful not to define the fetus as a *person*.[49] In other words, the court recognized the fetus as a *life*, and refused to draw a line between prenatal and postnatal life: "The right to life is guaranteed to everyone who 'lives'; no distinction can be made between the individual stages of the life developing itself before birth, or be-

45. In fact, respondents argued that criminal sanctions violated the woman's right to dignity under Article 1(1) by not allowing women the choice to have an abortion during the first trimester. *See supra* note 36. They argued that the state's duty, during the first twelve weeks after conception, was greater towards the woman than towards the fetus and that therefore the exemption did more than criminal sanctions to affirm the constitutional mandate. 39 BVerfGE at 30-31.

46. The constitutional court is divided into two separate panels, called *senates*. The two senates, made up of eight judges each, operate independently of each other. Each senate is vested with authority to hear particular kinds of cases, although the senates' separate jurisdiction has changed over the years. Currently, for example, the first senate decides all cases involving substantive issues of constitutional law, whereas the second senate is authorized to decide constitutional issues of civil and criminal procedure. Both senates meet together to resolve jurisdictional conflicts between the senates and to reallocate jurisdiction between the senates in order to keep the caseloads of the two panels fairly comparable. The abortion case was decided by the first senate. *See* KOMMERS, *supra* note 32, at 19-21.

47. 39 BVerfGE 1.

48. See *infra* notes 274-90 and accompanying text for discussion of the dissent. Published dissents are extremely uncommon in the opinions of the constitutional court and were completely unheard of before 1971. According to Kommers, over 90 percent of the court's cases are decided unanimously:

> Dissenting justices—even if they have circulated written dissents inside the court—more often than not, and partly out of institutional loyalty, choose not to publish their dissents or even to be identified as dissenters. The prevailing norm seems to hold that personalized dissenting opinions are proper only when prompted by deep convictions.

KOMMERS, *supra* note 32, at 31. Moreover, majority opinions are never signed, thereby hiding the identity of the opinion's author from the general public. *Id.* Presumably, these customs are designed to lend moral authority to the institution of the court and to signify that constitutional decisions are made by the "court" and not by individual "judges."

49. 39 BVerfGE 1, 36.

tween unborn and born life."[50] The court based its interpretation of Article 2(2) primarily on what it considered the historical underpinnings of the right to life clause. It cited the constitutional debates for the proposition that the inclusion of Article 2(2) was primarily a reaction to the "destruction of life unworthy of life," the "final solution," and the "liquidations" carried out under the Nazi regime.[51] As a result, "[t]he security of human existence against encroachments by the state would be incomplete if it did not also embrace the prior step of 'completed life,' unborn life."[52]

The court then determined that the state had a duty to protect unborn life against illegal intrusions by "others."[53] Central to this finding was the conclusion that the duty to protect extended particularly against the woman. The court explicitly rejected the contention that the fetus should be viewed as part of the woman. Rather, it stated that the fetus represents an *independent* human life, which the state must protect.[54] While the court recognized the constitutional right of the woman to the free development of her personality,[55] it held that this right was not unlimited. In weighing the woman's right to self-determination and privacy against the fetus's right to life and dignity, the court decided in favor of the protection of life.[56] The fetus's right to life outweighed the woman's right to privacy throughout the pregnancy.

The court went on to emphasize the crucial pedagogical role that law plays in German society. According to the court, the state must always proceed from the premise that it is a moral duty to carry a pregnancy to term.[57] The state may not use a woman's right to self-determination as its sole guidance in regulatory matters. The social order must view abortion as an illegality, and the state's disapproval of abortion must be expressed in its laws.[58]

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50. *Id.* at 37, *translated in* Gorby & Jonas, *supra* note 7, at 638.

51. *Id.* at 36, *translated in* Gorby & Jonas, *supra* note 7, at 637.

52. *Id.* at 37, *translated in* Gorby & Jonas, *supra* note 7, at 638. *But see infra* notes 282-89 and accompanying text for the dissent's discussion of this subject.

53. 39 BVerfGE at 42, *translated in* Gorby & Jones, *supra* note 7, at 642.

54. 39 BVerfGE at 42.

55. *See* GG art. 2(1), *supra* note 43.

56. 39 BVerfGE at 43.

57. "[These women] decline pregnancy because they are not willing to take on the renunciation and the natural motherly duties bound up with it." 39 BVerfGE at 56, *translated in* Gorby & Jonas, *supra* note 7, at 653. It is difficult not to be reminded of similar "duties" during the Nazi period to bear Aryan children for the Fatherland. *See* JILL STEPHENSON, WOMEN IN NAZI SOCIETY 64, 69, 197 (1975); Bock, *supra* note 22, at 275.

58. The court's requirement that the state must take a strong moral position against abortion can be derived from several constitutional provisions. Clearly the court has decided that the right to life provision in Article 2(2) of the Constitution is the supreme value to be protected. GG art. 2(2). Consequently, the state may not take a position that contradicts this constitutional imperative. Moreover, the fact that Article 6 of the Constitution celebrates marriage and family indicates the high value marriage and family are accorded in German society. According to Article 6,

> (1) Marriage and family shall enjoy the special protection of the state.
>
> (2) The care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. The national community shall watch over their endeavors in this respect.

The impression that an abortion can be put on the same moral plane as an ordinary doctor's appointment must be avoided. Accordingly, the state may not shirk the responsibility of enforcing the moral order; it may not recognize a period of time when abortions are exempt from criminal sanction and thus essentially condoned.[59]

After concluding the first half of its opinion with this strongly moralistic admonishment, the court proceeded to the ruling's practical application. In the end, the final holding was far less draconian than one would have expected after the first half of the opinion. Having determined that the state has a responsibility to prevent abortions, the court held that the means of achieving this goal should be left to the legislature. According to the court, criminal sanctions should be used only as a last resort; the state first should do all it can to allow women to carry to term without economic or social hardship.[60] The court invoked the constitutional principle of the social welfare state[61] and urged lawmakers to make it as easy as possible for women to have babies. The court also stated that criminal sanctions should not be used for the protection of fetal life in the same way or to the same degree of severity as for the protection of postnatal life.[62] It therefore indicated that it would be constitutional for a legislature to decline to punish women who obtained abortions.[63] However, the court underscored again that the overall purpose of any abortion law must be the prevention of abortions. Therefore, if other means failed to protect developing life effectively, lawmakers would be obligated to define abortion as a crime.[64]

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(3) Children may not be separated from their families against the will of the persons entitled to bring them up, except pursuant to a law, if those so entitled fail or the children are otherwise threatened with neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Illegitimate children shall be provided by legislation with the same opportunities for their physical and spiritual development and their place in society as are enjoyed by legitimate children.

GG art. 6, *translated in* BASIC LAW, *supra* note 36, at 15. Finally, neutrality in church-state relations, while present in Germany, means something very different than it does in the United States. For example, the German Constitution permits religious instruction in public schools, GG art. 7(3), and allows churches to levy taxes. GG art. 140; *see also* KOMMERS, *supra* note 32, at 472. Presumably, religion is also allowed to influence the state's position on abortion.

The German constitutional court's mandate of state-endorsed morality differs drastically from the United States Supreme Court's decision in Webster v. Reproductive Health Services, 492 U.S. 490, 506 (1989), which held that a state *may* (but apparently need not) formulate laws that favor childbirth over abortion. See *infra* notes 165-74 and accompanying text for a discussinon of *Webster*.

59. 39 BVerfGE at 44. The court reasoned that since over 90 percent of abortions were performed during the first trimester, the exemption for the first twelve weeks would have constituted a de facto legalization of abortion. *Id.* at 53-54.

60. *Id.* at 44-45.

61. "The Federal Republic of Germany is a democratic and social federal state." GG art. 20(1), *translated in* BASIC LAW, *supra* note 36, at 23.

62. 39 BVerfGE at 45.

63. *Id.* at 48.

64. *Id.* at 47. Presumably criminal sanctions would extend particularly to doctors performing abortions.

Finally, the court proposed its own model for abortion regulation in compliance with the Constitution. It suggested that, although abortions should remain illegal generally, they might be legally justified in certain cases.[65] This proposition became known as the *indications model.* The court examined situations in which forcing the woman to carry her fetus to term would be unreasonable (*Unzumutbarkeit*)[66] since the woman's constitutional rights outweighed those of the fetus. Specifically, the court pointed to the medical indication (where the woman's life or health is endangered) as constituting an area where the woman's rights clearly trumped. It also added the *ethical indication* (cases where the pregnancy is a result of rape or incest) and the *eugenic indication* (where the fetus is likely carrying a hereditary defect or illness) as situations where the state should not use the criminal law to force the woman to carry to term.[67] What set this model apart from the law as it had been during the Weimar Republic was the court's inclusion of a *social indication,* where certain social factors rendered it too great a sacrifice for the woman to continue her pregnancy.[68] The court did not specify what social difficulties would need to be present to invoke this indication. It did, however, urge the legislature to reduce the need for this indication by providing the pregnant woman with consultation and assistance, as well as encouragement to continue her pregnancy.[69]

To summarize, the constitutional court struck down the 1974 Abortion Reform Act[70] on several grounds. Most significantly, the Act did not adequately disapprove of abortion. In the view of the court, the twelve week exemption period essentially condoned abortions, thereby violating the state's duty to protect unborn life. By creating the exemption, the Act did not satisfactorily distinguish between valid abortions (valid because of indications) and invalid abortions. In addition, the counseling requirement provided for in the Act was flawed because it would not necessarily deter abortions.[71] Instead,

65. *Id.* at 49-51.

66. *Id.* at 48. The German word *Unzumutbarkeit* is translated literally as an "unreasonable demand." LANGENSCHEIT'S STANDARD GERMAN DICTIONARY 1294 (enlarged and updated ed. 1983). Other valid translations would be "unreasonable sacrifice" or "undue burden." While clearly different, some parallels may be drawn between the concept of *Unzumutbarkeit* and the undue burden analysis used by the Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), first proposed by Justice O'Connor in Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting). *See infra* notes 160-62 and accompanying text.

67. 39 BVerfGE at 49-50. Beyond citing reasons put forth in the legislative debates, the court did not specify why it approved of abortion in cases where the fetus was deformed or faced serious health problems or where the woman had been raped. Gerstein & Lowry, *supra* note 9, at 866 n.104.

68. 39 BVerfGE at 50.

69. *Id.*

70. 1974 BGBl. I 1297.

71. The Court identified several problems with the counseling provision: doctors did not have the training or the time to conduct adequate counseling; counseling boards were not required to try to persuade women of the need to carry to term; and doctors had a conflict of interest in cases when they performed both counseling and the abortion. 39 BVerfGE at 61-64.

the court urged legislators to adopt its indications model, since, in the court's view, it was consistent with the necessary condemnation of abortion generally but would still allow women to obtain abortions in cases of severe medical or social hardship. Accordingly, the court declared the Abortion Act unconstitutional and instructed the Bundestag to adopt a new abortion statute in accordance with the Constitution.

C. Abortion Regulation Between 1975 and 1989

One year after the constitutional court's decision, the Bundestag passed an amended Abortion Act in compliance with the court's order.[72] Instead of a twelve week exemption period, the law adopted the indications model proposed by the court. Abortions became illegal throughout the pregnancy, although they could be justified during the first twelve weeks if the woman was able to show that the pregnancy was a result of rape or incest or if there were social factors that would make it unreasonable to force the woman to carry to term.[73] An abortion was justified within the first twenty-two weeks if there was reason to believe that the fetus was deformed or handicapped so as to make it unreasonable to force the woman to continue her pregnancy.[74] Lastly, termination of pregnancy was allowed at all times if the woman's life or health was in danger as a result of the pregnancy.[75]

Before being able to invoke any of the indications, the pregnant woman was required to seek counseling by a recognized counselor or a doctor.[76] The counseling doctor could not be the same one who would perform the abortion. The purpose of counseling was to inform the woman of the availability of public and private assistance in order to encourage the continuation of her

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It is not clear whether the elimination of these problems would have cured the law in constitutional terms. *See* Kommers, *supra* note 9, at 398.

72. STRAFGESETZBUCH [StGB] [Penal Code] §§ 218-219b.

73. StGB § 218a. The Bundestag, like the court, failed to identify the social factors that satisfied the indication. Rather, the legislation left the decision to the doctor who counseled the pregnant woman before her abortion. This doctor could not be the same one who would perform the abortion. 23 ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH KOMMENTAR 1464 (1988) (commentary to StGB § 218a). Schönke and Schröder, in their commentary on the law, list some of the factors that doctors could consider in their evaluation, such as the age of the woman (sixteen is cited as the cut-off point), the possible danger of the pregnancy to her marriage, whether the pregnancy would cause potential unemployment, and whether the pregnancy would significantly interrupt her education or significantly decrease her standard of living. *Id.* Since each determination of whether the social indication could be invoked was case specific, such determinations differed drastically, depending on the doctors and their views on abortion and the part of the country where the evaluation took place. *See infra* note 81.

74. StGB § 218a.

75. *Id.* The medical indication included consideration of the psychological health of the woman. For this determination, the pregnant woman's current and future social circumstances could be considered. 21 SCHÖNKE & SCHRÖDER, *supra* note 40, at 1312 (commentary to StGB § 218a). Consequently, there was sometimes an overlap between the medical and the social indication.

76. StGB § 218b.

pregnancy.[77]

Despite the clear position taken by the court and by the subsequent law, the law's effect varied in practice. Under German law, the states are generally in charge of enforcing federal laws, which can lead to substantial variations among the different states.[78] In many parts of Germany, women had no difficulty obtaining abortions in the first trimester—most often as a result of the social indication, which was invoked in 90 percent of all abortions in Germany.[79] This development led conservative commentators to charge that the social indication had become nothing but a euphemism for the twelve week exemption period struck down by the court.[80] On the other hand, in the more conservative and predominantly Catholic states, most notably Bavaria and Baden-Württemberg, it was very difficult for women to invoke the social indication and consequently very difficult to obtain an abortion.[81]

In 1977, both the German court's decision and the new abortion statute were challenged before the European Commission of Human Rights on the ground that they interfered with the right of privacy guaranteed under Article 8 of the European Convention on Human Rights.[82] With one dissent, the commission rejected the challenge, holding that the right to privacy was not absolute and that the state could legitimately interfere in women's private lives to save fetal life.[83]

After the European Commission's decision, the abortion debate in Germany subsided to some extent. In the period between 1977 and 1989, there were some suggestions, however, that the court might be softening its stance on abortion. For example, the constitutional court declined to hear challenges

77. *Id.* Although nonphysicians were able to counsel, only physicians could perform abortions. 21 SCHÖNKE & SCHRÖDER, *supra* note 40, at 1293 (commentary to StGB § 218a).

78. KOMMERS, *supra* note 32, at 85.

79. Morris, *supra* note 33, at A10. This high figure may be somewhat deceptive. Michael Mattern cites a recent empirical study of abortion in West Germany, which indicated that only

> fifty percent of all women polled were able to obtain an attestation of indication on their first visit to a doctor. Ten percent of the women questioned had to visit three or more doctors. Of the women who failed to find an attesting physician, about half obtained illegal or foreign abortions. The rest continued the pregnancy to term.

Mattern, *supra* note 13, at 686.

80. *See, e.g.*, Rolf Stürner, *Die Unverfügbarkeit Ungeborenen Menschlichen Lebens und die Menschliche Selbstbestimmung [The Indispensability of Unborn Human Life and Human Self-Definition]*, 45 JURISTEN ZEITUNG 709 (1990).

81. The *San Francisco Chronicle* noted the disparity between North and South: "A doctor in Berlin, for instance, might approve an abortion because giving birth would interrupt a woman's education. But in conservative Bavaria, a poor single mother with five children might be refused an abortion because financial aid is available." Morris, *supra* note 33, at A10. It is not surprising then that 60 percent of women from Baden-Württemberg seeking an abortion went to another state or to a foreign country. Mattern, *supra* note 13, at 686. The difference in the ease of invoking the social indication obviously disparately affected poorer women who could not afford to travel to obtain an abortion.

82. Brüggemann v. Federal Republic of Germany, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100 (1977).

83. GLENDON, *supra* note 9, at 32.

to public financing of legal abortions[84]—including those performed under the social indication[85]—thereby implicitly condoning the use of public funds for such purposes. Similarly, in early 1989, the court chose not to hear a petition by an employer who claimed that it was against her conscience to pay for the sick-leave of an employee who had a legal abortion. The court noted that the employee had a right to a salary that could not be withheld for this reason.[86]

On the other hand, 1989 also brought one of the most spectacular prosecutions involving illegal abortions since the new law came into effect in 1976. Dr. Horst Theissen was put on trial for performing at least seventy-nine illegal abortions between 1981 and 1987 in the conservative southern town of Memmingen. He was convicted and received a prison sentence of two and a half years.[87] Dr. Theissen claimed at his trial that he had performed the abortions because all of the women were experiencing distressing circumstances. The women had not, however, been able to find a second doctor in that part of the country to approve social indication, as required by the law.[88] Nearly two hundred women were forced to testify in court about their reasons for obtaining abortions. To many this amounted to a witch hunt, putting the women, rather than the doctor, on trial.[89] Furthermore, since the prosecution's case was based largely on confidential doctor-patient files seized by the police, many women felt their privacy had been grossly invaded.[90] This case further chilled women's ability to obtain abortions in southern Germany.

D. The Abortion Debate After Unification

On November 9, 1989, the Berlin Wall came crashing down, and with it forty-one years of two Germanys and two German legal systems. In the area of abortion, unlike in most other areas, East Germany had a more liberal law.

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84. Judgment of Apr. 18, 1984, BVerfG, 67 BVerfGE 26; *see* Monika Frommel, *Strategien gegen die Demontage der Reform der §§ 218ff StGB [Strategies Against the Dismantling of the Reform of §§ 218ff of the Penal Code]*, STREIT, June 1990, at 78.

85. Claus Classen, *Abtreibung—Verfassung—Deutsche Einheit: Schwierigkeiten bei der Rechtsangleichung [Abortion—Constitution—German Unity: Difficulties in the Legal Assimilation]*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 209, 219 (1991). In contrast, American abortion funding cases gave states the right to *refuse* public funding of abortions. *See infra* note 165 and accompanying text.

86. Judgment of Oct. 18, 1989, BVerfG, 40 NEUE JURISTISCHE WOCHENSCHRIFT 241 (1990).

87. Mattern, *supra* note 13, at 686 n.353 (citing *Hexenjagd in Bayern [Witch Hunt in Bavaria]*, DER SPIEGEL, Sept. 19, 1988, at 24); Morris, *supra* note 33, at A10. The conviction was later vacated and the case was remanded in December 1991 by the Bundesgerichtshof, Germany's highest court of appeal for nonconstitutional claims. The statute of limitations had by then expired on 20 of the counts for which he was originally convicted. Hans Faller, *Der Artzt ist Nicht Ganz Frei [The Doctor Is Not Entirely Free]*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 15, 1992, at 10.

88. StGB § 218a.

89. Reuters, *Germany Jails Gynecologist Who Performed 79 Illegal Abortions*, L.A. TIMES, May 7, 1989, at 13. In fact, 156 of Dr. Theissen's former patients were eventually prosecuted, and many received fines of up to $1,600 dollars. Nina Bernstein, *Abortion Compromise Salvages German Treaty*, N.Y. NEWSDAY, Aug. 31, 1990, at 13.

90. Morris, *supra* note 33, at A10.

Since 1972, women had been able to obtain abortions on demand during the first trimester. There was no compulsory counseling.[91] During the summer of 1990, representatives from East and West Germany who were formulating the terms of the Unification Treaty were faced with two divergent laws on abortion. In most areas of statutory conflict, the Unification Treaty[92] simply called for the law of West Germany to replace that of the East. The abortion case was different, however:

> [S]uch a resolution would have been difficult because of the strongly held popular view in the GDR—among feminists and other groups—that it was essential to retain the more liberal GDR abortion rule. . . . Moreover, the western Social Democrats, whose votes were necessary for the requisite two-thirds majority for the Unification Treaty, might have balked at a resolution that simply extinguished the abortion policy of the GDR.[93]

After much debate, the drafters of the Unification Treaty finally reached a compromise that has been called a "masterpiece of ambiguity."[94] In effect, the compromise postponed a new abortion law for all of Germany for two years. Both parts of Germany retained their old laws until the end of 1992, by which time the German Bundestag had to create a new law for all of Germany. As a result, abortion continued to be prohibited in western Germany, whereas women in the former East Germany could still obtain abortions on demand during the first twelve weeks.[95] In addition, the Unification Treaty called for the establishment of counseling centers in eastern Germany, paid for by the government.[96] These offices were to provide women with informational and financial assistance in carrying their fetus to term and were designed to decrease the number of abortions in the East during the interim period.[97] The drafters toyed with the idea of limiting the more liberal law in the East to women who could prove that they lived there (to prevent "abortion tourism" from West to East Germany), but eventually concluded that this would be administratively unmanageable.[98]

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91. The preamble to the 1972 East German abortion law states: "The equality of women in their education and careers, marriage and family, requires that the woman herself decides about pregnancy and the continuation of pregnancy." 1972 Gesetzblatt der DDR, Teil I [GBl. I] 89 (G.D.R.) (author trans.). The East German law allowed abortion on demand during the first trimester; termination of pregnancy thereafter was legal only if approved by a commission of physicians. *Id.*; *see also* GLENDON, *supra* note 9, at 165 n.66.

92. Treaty on the Establishment of German Unity, Aug. 31, 1990, F.R.G.-G.D.R., 1990 Bundesgesetzblatt, Teil II [BGBl. II] [Federal statute, Part II] 889 (F.R.G.).

93. Quint, *supra* note 9, at 565.

94. *Id.*

95. *Id.* at 566; Classen, *supra* note 85, at 209.

96. 1990 BGBI. II 900.

97. Quint, *supra* note 9, at 565.

98. Roland Helgerth & Peter König, *Das Strafanwendungsrecht beim Schwangerschaftsabbruch nach dem Einigungsvertrag [Application of the Penal Code to Abortions After the Unification Treaty]*, 1991 JURISTISCHE RUNDSCHAU 177, 178.

For fear that maintaining a liberal abortion law on German territory would violate Articles 1(1) and 2(2) of the Constitution,[99] as interpreted in the 1975 abortion decision, the drafters of the Unification Treaty also included a provision for the addition of a new amendment to the Constitution. The drafters provided that this amendment would suspend certain provisions of the Constitution for an interim period.[100] Hence, from 1990 until the summer of 1992, two different abortion laws coexisted in Germany.

E. A New Abortion Law

On June 26, 1992, six months before the deadline imposed by the Unification Treaty, the Bundestag passed a new abortion law for all of Germany.[101] The law followed months of debate about whether the new law should mirror the old indications model of West Germany, follow the more liberal law of the former East Germany, or reflect a compromise between the two models. All of the major parties presented proposals for the new law. These proposals ranged from the Christian Social Union's (CSU) position that even the indications model was too lenient, to the Green party's platform of complete freedom of choice for the woman throughout her pregnancy.[102] In the end, a compromise proposal by the Free Democrats (FDP) and Social Democrats (SPD), joined by some members of other parties, carried the day with 357 votes to 283. The Bundestag's affirmative vote was made possible by the parties' agreement not to vote along party or coalition lines, an agreement reached due to the volatile social implications of abortion.[103] The FDP, one sponsor of the new law, split in its entirety from its governing coalition part-

99. For text of these Articles, see *supra* note 36.

100. BGBl. II 890-91. The new article of the Constitution, Article 143(1), provides for the temporary suspension of certain constitutional provisions:

> For the period up to December 31, 1992 (but no longer), law in [the territory of the former GDR and East Berlin] can deviate from determination of this Basic Law, so long as and to the extent that, as a result of differing circumstances, full conformity with the order of the Basic Law cannot yet be achieved. [Any such] deviations may not violate article 19(2). . . .

GG art. 143(1), *translated in* Quint, *supra* note 9, at 567. Article 19(2) provides, "In no case may the essential content of a basic right be encroached upon." GG art. 19(2), *translated in* BASIC LAW, *supra* note 36, at 22.

101. 1992 BGBl. I 1398; *see also* Ferdinand Protzman, *Germany Widens Abortion Rights After Fierce Debate in Parliament*, N.Y. TIMES, June 26, 1992, at A6.

102. Gerda Hasselfeldt, *Das Lebensrecht des ungeborenen Kindes—Der Standpunkt der CSU zum § 218 [The Right to Life of the Unborn Child—the Position of the CSU on § 218]*, *in* § 218: ZUR AKTUELLEN DISKUSSION 124 (Andrea Hammer & Elke Reichart eds., 1992) [hereinafter DISKUSSION]; Jutta Oesterle-Schwerin, *Keine Frist, Keine Zwangsberatung—Der Standpunkt der Grünen zum § 218 [No Time Limit, No Mandatory Counseling—the Position of the Greens on § 218]*, *in* DISKUSSION, *supra*, at 142.

103. Voting in the Bundestag is usually very predictable because members are forced to vote in their coalition (most disputes are dealt with in party meetings). Irmgard Schwaetzer, *Fristenreglung—Die Bessere, Gerechtere und Menschlichere Möglichkeit für Frauen in Konfliktsituationen: Der Liberale Standpunkt zum § 218 [The Time Period Regulation—the Better, More Just, and More Humane Possibility for Women in Conflictual Situations—the Liberal Position on § 218]*, *in* DISKUSSION, *supra* note 102, at 139.

ner, the Christian Democrats (CDU). Twenty legislators from the CDU also voted in favor of the new law, despite strong pressure to adhere to the party line.[104]

The new law was very reminiscent of the original 1974 law struck down by the constitutional court. It contained a twelve week exemption period after conception during which a woman could obtain a legal abortion without invoking an indication.[105] In order to take advantage of this exemption period, the woman was required to prove to the doctor who would perform the abortion that she had undergone counseling either with a doctor or at a specially designated counseling center no less than three days before the abortion.[106] The doctor performing the abortion could not be the same doctor who counseled the woman.[107] According to the law, the counseling had to "serve the protection of life through advice and assistance to the pregnant mother in recognition of the high value of fetal life."[108] The law remained unchanged from the former West German law for cases where the life or health of the woman was in danger, in which case abortion was always legal, or where the fetus was damaged, in which case abortion was legal through twenty-two weeks.[109]

Not surprisingly, the constitutionality of the new law was soon challenged.[110] Despite similarities between the new law and the unconstitutional 1974 law, many commentators believed that the new law would survive.[111] First, German law does not rigorously follow the principle of stare decisis,[112] so the 1993 court was not bound by its 1975 decision. Second, in 1975, the first senate of the constitutional court had decided the abortion case. The law changed during the succeeding seventeen years however, and in 1993 the second senate was responsible for questions concerning the constitutionality of criminal laws.[113] This senate therefore was even less bound by precedent than the first senate, since it did not produce the original decision.[114] Finally, the composition of the court had changed completely since 1975, with none of the members of the original majority still on the court.[115]

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104. Protzman, *supra* note 101, at A6.

105. 1992 BGBl. I 1402.

106. *Id.*

107. *Id.*

108. *Id.* at 1403 (author trans.); *see also Parteiübergreifender Antrag [The Multiparty Proposal]*, FRANKFURTER RUNDSCHAU, June 27, 1992, at 3.

109. 1992 BGBl. I 1402.

110. The law was challenged by 249 members of the Bundestag and by the government of Bavaria under the abstract review procedure. Stephen Kinzer, *German Court Restricts Abortion, Angering Feminists and the East*, N.Y. TIMES, May 29, 1993, at A1. For a discussion of abstract review, see *supra* note 32.

111. *See, e.g.*, Schueler, *supra* note 25, at 3; *Vorläufiger Stopp Durchaus Möglich [Provisional Stop Definitely Possible]*, FRANKFURTER RUNDSCHAU, June 27, 1992, at 5.

112. KOMMERS, *supra* note 32, at 4.

113. Schueler, *supra* note 25, at 3; *Vorläufiger Stopp Durchaus Möglich*, *supra* note 111, at 5.

114. Schueler, *supra* note 25, at 3.

115. *Id.*

More importantly, the new law differed from its unconstitutional predecessor in ways significant to the court's earlier reasoning. The language of the law left no doubt that its purpose was the preservation of fetal life.[116] Rather than being neutral on the content of counseling, as the 1974 law could have been interpreted to be, the new law was clear that counseling should lead to fewer abortions. The doctor counseling the pregnant woman could not perform the abortion, since this would lead to a conflict of interest. At least three days had to pass between counseling and the abortion, presumably to allow the woman time to contemplate her decision.[117] In addition, the new law included a right of all children to a place in kindergarten, at a cost of DM 21 billion, and measures to distribute free contraceptives to all young people under the age of twenty-one.[118] These provisions were added to the new law to assure the court that the legislature's intent was to reduce abortions. The court had had seventeen years to observe the effect—clearly far from the intended result—of the indications model it had imposed. Consequently, many commentators believed that this time the court would defer to the legislature and leave the new abortion law untouched.[119]

F. The 1993 Abortion Decision[120]

On May 28, 1993, the constitutional court[121] announced its decision on the constitutionality of Germany's new abortion law.[122] As in 1975, the court attempted to reach a compromise between the proponents and opponents of the law. In a 134 page decision, the court held the new abortion law unconstitutional and painstakingly laid out its view of abortion regulation, retaining certain aspects of the law and rejecting others.[123]

First and foremost, the court rejected the law's attempt to legalize abortion during the first three months of pregnancy.[124] Affirming its 1975 ruling, the court declared categorically that the fetus has a right to life under Article 2(2) of the German Constitution[125] and that the fetus's right to life takes pre-

116. *See supra* note 108 and accompanying text.

117. 1992 BGBl. I 1402.

118. *Id.* at 1400; *see also Parteiübergreifender Antrag*, *supra* note 108, at 3.

119. *See, e.g.*, Helmut Kerschler, *Die Korrektur des Unwägbaren [The Correction of the Imponderable]*, SÜDDEUTSCHE ZEITUNG (Munich), May 29-31, 1993, at 3.

120. The 1993 German abortion ruling was decided after I began work on this Article. It does not affect my thesis or argument in any significant way. I have only included a brief discussion of the decision to allow the reader to gauge the contemporary effects of the 1975 decision on German abortion regulation.

121. As noted above, the second senate of the court was responsible for the decision. The second senate consisted of seven men and one woman and was known as the "Snow White" senate. Sabine Deckwerth, *Alle Seiten verbuchen einen Erfolg für sich [All Sides Expect Success]*, BERLINER ZEITUNG, May 29-30, 1993, at 2.

122. Judgment of May 28, 1993, BVerfG, 88 BVerfGE 203 (F.R.G.).

123. *Id.* at 208.

124. *Id.* at 210.

125. *Id.* at 251; *see also* discussion *supra* note 36 and accompanying text.

cedence over the woman's right to self-determination:[126] "The unborn has legal protection against its mother. Such protection is only possible if the legislature fundamentally prohibits abortion and thereby places on the mother a legal duty to carry the unborn to term."[127] Hence, the court concluded that abortion could never be legal except in cases of extreme hardship.[128] Since the 1992 abortion law legalized abortion during the first trimester, it was unconstitutional.

Second, the court followed its 1975 ruling in recognizing exceptions to the criminalization of abortion. According to the court, abortions continue to be legal if they fit into one of the recognized indications: if the woman's life or health is in danger, if the fetus is deformed, or if the pregnancy is the result of rape or incest.[129] At the same time, the court eliminated the social indication, which had justified most abortions in West Germany before unification.[130]

Third, in a surprising move, the court declared that even though abortion had to be illegal, it would not necessarily have to be criminalized during the first trimester.[131] The legislature could choose to "win over" the woman through extensive pro-life counseling requirements.[132] While the abortion law already sought to achieve this through its mandatory counseling provisions, the court decided that the existing counseling requirements did not go far enough.[133] The court held that mandatory counseling must serve the exclusive function of encouraging women to carry their fetuses to term; counseling centers have to make it clear to women that they are about to "destroy" life.[134] To fulfill their mandate, counseling centers may require several sessions with the woman and, with her consent, are free to call witnesses, including family members and even landlords to verify the information provided by the woman.[135] Furthermore, although the woman may remain anonymous, counseling sessions should be recorded to assure that counselors are fulfilling their function.[136] In its discussion of the counseling requirement, the court ordered the government to devise detailed instructions to doctors and counselors about the substance of the counseling. Under this ruling, a doctor may perform an illegal abortion without fear of punishment only after a counseling center has determined that further counseling would apparently have no effect and the woman has waited for three days.[137]

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126. 88 BVerfGE at 252.
127. *Id.* at 253 (author trans.).
128. *Id.* at 257.
129. *Id.* at 255-57.
130. *Id.* at 265; *see also supra* note 79 and accompanying text.
131. 88 BVerfGE at 264.
132. *Id.*
133. *Id.* at 270.
134. *Id.* (author trans.).
135. *Id.* at 286; *Die Hürde heit Beratung [The Hurdle is Counseling]*, DER STERN, June 3, 1993, at 150.
136. 88 BVerfGE at 288.
137. *Id.* at 289-90.

Fourth, the court decided that it could no longer condone the use of public funds to finance illegal abortions.[138] Abortions not justified by an available indication may no longer be performed in public hospitals or paid for by the national health insurance.[139] This prohibition against the use of public funds does not, however, apply to women who recieve public assistance. Women poor enough to be in this category may still use public funds to pay for their abortions as long as they can meet the counseling requirements.[140]

In summary, the constitutional court struck down the 1992 abortion law because it did not prohibit abortion throughout the pregnancy. Rather than return to the indications model of the 1975 decision, the court decided to allow the legislature not to punish women who, after extensive counseling, still insisted on terminating their pregnancy. Doctors could perform an abortion, without incurring criminal liability, upon the request of any woman who presented proof of counseling. However, the court also withdrew public funding of these "illegal" abortions, essentially making the availability of abortion dependent on the woman's financial status, although the abortions of poor women on public assistance would still be financed. With these detailed instructions, the court ordered the Bundestag to formulate a new abortion law.[141]

While extensive comment on this decision is beyond the scope of this Article, the decision was met with instant criticism.[142] Most critics focused on what they perceived to be the court's complete disregard of women's rights of self-determination and autonomy.[143] Some objected to the patronizing tone of the counseling provisions that sought to "educate" women about the significance of their action.[144] The court's withdrawal of public funding also drew serious criticism. Observers felt that this created two classes of women, those

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138. *Id.* at 313.

139. *Id.*

140. *Id.* at 320. This is, of course, different from the gernal lack of public funding for abortions in the United States. *See infra* note 165.

141. *Id.* at 203-04.

142. The *Leipziger Volkszeitung*, for example, editorialized:

> Twenty years of abortion on demand within the first trimester in eastern Germany were wiped away without much ado. The item that in the unification treaty served as a sign of hope for women in the East as well as the West, that is the adaptation of the abortion law to a social and political reality, was decided in one stroke of a pen. What resulted was the reduction of women to a birthing vessel; third persons are to decide on her well-being and suffering, are to decree yes and no on life. And, once again, the wallet will decide whether, when in doubt, one can afford a doctor or just a quack.

Cited in The Press on the Abortion Decision, German Information Center, June 4, 1993, *available in* LEXIS, Nexis Library, International File; *see also Constitutional Court Reverses 1992 Liberalization of Abortion: It's Now Unconstitutional But Will Not Be Prosecuted*, German Information Center, *supra* ("Regine Hildebrandt, the SPD [Social Democratic Party] minister for labor and welfare in Brandenburg . . . spoke of a 'catastrophe' for the women in the East.").

143. Tyler Marshall, *Liberal Abortion Law Overturned by German Court*, L.A. TIMES, May 29, 1993, at A1.

144. *See, e.g.*, Robin Gedye, *U-Turn on Abortion Leaves Germany's Democrats Fuming*, DAILY TELEGRAPH (London), May 29, 1993, at 12.

who could afford abortions and those not poor enough to receive public assistance but not rich enough to pay the cost of obtaining a safe abortion.[145] Constitutional rights, many noted, should not turn on the ability to pay for them.[146] Women in the eastern part of Germany were upset about the loss of the right—more than twenty years old—to abortion on demand during the first trimester.[147] Moreover, East German women, 63 percent of whom are unemployed, are disproportionately among those severely affected by the withdrawal of public funding.[148] Finally, at least one commentator objected to the overreaching of the judges into the legislative arena: "Why in the world can't the judges show restraint in an area in which they are no more competent than politicians, or any of us, and much less knowledgeable than all women?"[149]

There is little doubt that, like the constitutional court's 1975 abortion decision, the 1993 decision will be analyzed, praised, and criticized by many comparativists. Perhaps Kommers and Glendon will add their perspectives. This Article, however, is concerned with the positions taken by Glendon and Kommers in regard to the 1975 decision. It is to those analyses I turn now.

II
THE GERMAN ABORTION DECISION AS A GUIDEPOST FOR AMERICA: GLENDON'S AND KOMMERS'S COMPARATIVE ANALYSIS

To set the stage for Glendon's and Kommers's argument that the reasoning behind the 1975 West German decision provides a solution to the American abortion debate, I will briefly discuss abortion jurisprudence in the United States, as developed in the line of cases beginning with *Roe v. Wade*.[150]

A. From Roe *to* Casey, *and a Woman's Right to Privacy*

The Supreme Court's decision in *Roe* recognized that a "woman's decision whether or not to terminate her pregnancy" falls within a zone of privacy protected against state interference by the Fourteenth Amendment.[151] The court had first articulated a right to privacy in reproductive choices in *Gris-*

145. *See, e.g.*, Steve Crawshaw, *Court Annuls Germany's Liberal Law on Abortion; Angry Reaction as Country "Takes a Step Back into the Middle Ages,"* THE INDEPENDENT (London), May 29, 1993, at 10.

146. *See, e.g.*, Gedye, *supra* note 144, at 12.

147. Marshall, *supra* note 143, at A1; Thomas Kröter, *Die Suche nach den positiven Seiten [The Search for the Positive Sides]*, DER TAGESSPIEGEL (Berlin), May 29, 1993, at 3.

148. Marc Fisher, *German Court Rules Most Abortions Illegal; Punishment Barred for Early Procedures with Counseling*, WASH. POST, May 29, 1993, at A20.

149. Rolf Schmidt-Holtz, *Richter Ohne Schranken [Judge Without Boundaries]*, DER STERN, June 3, 1993, at 151 (author trans.). According to *The Daily Telegraph*, recent polls in Germany indicate that a majority of Germans approve of abortion in the early stages of pregnancy. Gedye, *supra* note 144, at 12.

150. 410 U.S. 113 (1973).

151. *Id.* at 153.

wold v. Connecticut.[152] In *Griswold*, the court inferred this right from various provisions of the Bill of Rights and found it applicable to the states through the Due Process Clause of the Fourteenth Amendment. The *Roe* Court held that, as a fundamental right, abortion could be regulated only in the presence of a compelling state interest.[153] According to *Roe*, the state maintained two important interests in regulating abortion: protection of the woman's health and protection of the fetus. However, these state interests only became compelling during the later stages of pregnancy.[154] The majority created a trimester approach to abortion regulation that placed varying emphases on the state's interests and the woman's rights throughout the pregnancy. During the first trimester, neither state interest was compelling, and the woman's right to privacy remained untouched.[155] During the second trimester, the state's interest in protecting the woman's health became compelling and state regulation of the abortion procedure became permissible. Abortion could not, however, be prohibited during that trimester.[156] At the end of the second trimester, when the fetus is considered viable outside the woman, the state's interest in protecting the fetus becomes compelling. From this point on, a state could fully prohibit abortions.[157]

During the late 1970s and early 1980s, the Court reaffirmed and clarified the principles it had laid out in *Roe*, amid ever increasing dissents. In *Planned Parenthood v. Danforth*,[158] the Court held that the choice to have an abortion is the woman's alone and that the government may not give the man who shared responsibility for the pregnancy the power to interfere in the woman's decision.[159] In *Akron v. Akron Center for Reproductive Health*,[160] the Court reaffirmed the trimester framework of *Roe*[161] despite a strong challenge to that system by Justice O'Connor in dissent.[162] Challenges to *Roe* continued in

152. 381 U.S. 479 (1965).

153. 410 U.S. at 154.

154. *Id.* at 162-63.

155. *Id.* at 163.

156. *Id.* For example, states could require that second trimester abortions be performed in a hospital.

157. *Id.* at 163-64.

158. 428 U.S. 52 (1976).

159. *Id.* at 69-72.

160. 462 U.S. 416 (1983).

161. *Id.* at 420. Specifically, *Akron* held that while states may force minors trying to obtain abortions to seek parental consent, requirements of such parental consent must provide for a judicial bypass if the minor can demonstrate that she is sufficiently mature, that her best interests would be served by not telling her parents, or that the abortion would be in her best interest. *Id.* at 427 n.10.

162. As a substitute to the strict scrutiny trimester approach of *Roe*, Justice O'Connor introduced a new constitutional standard to regulating abortion, which she termed an "undue burden" analysis:

> In my view, this "unduly burdensome" standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular "stage" of pregnancy involved. If the particular regulation does not "unduly burden" the fundamental right . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.

Thornburgh v. American College of Obstetricians and Gynecologists.[163] The case involved a Pennsylvania law imposing strict regulations on abortion providers, including requirements of informed consent, dissemination of printed information, detailed reporting, and special procedures for determining viability. The majority struck down these regulations, noting that several of them would "chill" the freedom to have an abortion.[164]

In 1989, the pattern of reaffirming *Roe* for privately funded abortions[165] came to an end in *Webster v. Reproductive Health Services.*[166] *Webster* addressed a Missouri abortion law that included a restriction on the performance of abortions in publicly funded institutions, a preamble to the statute declaring that "the life of each human being begins at conception," and a requirement that viability tests be performed when the woman is believed to be twenty weeks pregnant.[167] Largely due to significant personnel changes on the Court,[168] the Court upheld Missouri's regulations. The five members of the Court in the majority could not, however, agree on the reasons for upholding the regulations. Justice Scalia wanted to overrule *Roe* outright;[169] Justice O'Connor again applied her undue burden analysis and found the regulations not to be unduly burdensome;[170] and the remaining three justices concluded that the government had an interest in protecting potential life throughout the pregnancy and applied a rational basis test to find Missouri's regulation constitutional.[171]

While not explicitly overruling *Roe*, the plurality's attack on *Roe* and its trimester system indicated that the Court was ready to move away from a *Roe*-type analysis of abortion cases. For the first time, the Court had upheld

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Akron, 462 U.S. at 453 (O'Connor, J., dissenting). This test was essentially adopted by the Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992). *See infra* notes 175-85 and accompanying text.

163. 476 U.S. 747 (1986).

164. *Id.* at 767-68.

165. A series of decisions upheld the government's power to limit or eliminate funding for abortion services for women receiving public assistance, while continuing to fund fully childbirth services. In Maher v. Roe, 432 U.S. 464, 474 (1977), the Court sustained a Connecticut law that excluded medically unnecessary abortions from coverage by a Medicaid funded program. In the companion case of Poelker v. Doe, 432 U.S. 519, 521 (1977), the Court held that a public hospital that provided childbirth services was not required to provide nontherapeutic abortion services. Finally, in Harris v. McRae, 448 U.S. 297, 311 (1980), the Court extended the rationale of *Maher* to permit state and federal governments to eliminate even medically necessary abortions from coverage by the Medicaid program.

166. 492 U.S. 490 (1989) (plurality opinion).

167. *Id.* at 501 (concurring in part and concurring in the judgment).

168. During the 1980s, President Reagan appointed three conservative justices—O'Connor, Scalia, and Kennedy—to replace justices who had been in the majority in *Roe*. O'Connor replaced Potter Stewart; Scalia replaced Rehnquist, who replaced Warren Burger as Chief Justice; Kennedy replaced Lewis Powell.

169. 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment).

170. *Id.* at 530.

171. In so doing, Justice Rehnquist's plurality opinion described the woman's right to choose to have an abortion as a mere "liberty interest," rather than as a fundamental right. *Id.* at 520.

significant restrictions on privately funded abortion in the first two trimesters. In addition, the Court reaffirmed the position, first taken in *Maher v. Roe*,[172] that a state was free to favor childbirth over abortion.[173] The murky reasoning of *Webster*, as well as the uncertainty as to *Roe*'s remaining force, paved the way for an onslaught of state laws further restricting abortion rights.[174] The first of these laws reached the Court in 1992 and resulted in the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[175]

Casey charts a new path for abortion regulation in the United States. The plurality opinion in *Casey*, written jointly by the Court's three centrist justices, abandoned the trimester viability framework of abortion regulation first established in *Roe* and applied a version of Justice O'Connor's undue burden analysis to uphold four of the five challenged provisions of Pennsylvania's abortion regulation statute.[176] The plurality found only the spousal notification requirement unduly burdensome and struck down that restriction with the help of Justice Stevens, who would have invalidated all restrictions under the undue burden test,[177] and Justice Blackmun, who continued to stand by his *Roe* framework.[178]

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172. 432 U.S. 464 (1977); *see* discussion *supra* note 165.

173. Justice Rehnquist stated that *Roe* "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion." 492 U.S. at 506 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).

174. For example, such laws were passed (and subsequently enjoined) in Louisiana, Guam, and Utah. Sojourner T. v. Roemer, 772 F. Supp. 930 (E.D. La. 1991) (enjoining Louisiana law), *aff'd sub. nom.*, Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1414 (1993); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422 (D. Guam 1991) (enjoining Guam's law), *aff'd*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992); Jane L. v. Bangerter, 809 F. Supp. 865, 870, 876 (D. Utah 1992) (enjoining the Utah law insofar as it prohibited previability abortions before 21 weeks gestational age and required notification of husband by physician). These laws and the legal challenges that have been filed against them are summarized in Rachael N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407 (1992).

175. 112 S. Ct. 2791 (1992) (plurality opinion). *Casey* may be the Court's last word on the subject for some time. Since the *Casey* decision, the Court has denied certiorari to Guam's and Louisiana's appeals from lower court decisions striking down overly restrictive abortion laws. *See* Ada v. Guam Soc'y of Obstetricians & Gynecologists, *cert. denied*, 113 S. Ct. 633 (1992); Edwards v. Sojourner T., *cert. denied*, 113 S. Ct. 1414 (1993).

176. The law included five requirements: (1) a woman seeking an abortion must give her informed consent prior to the procedure; (2) she must be provided with certain information at least 24 hours before the abortion; (3) a minor must obtain parental consent unless a judicial bypass is granted; (4) a married woman seeking an abortion must notify her husband of her intended abortion; and (5) facilities providing abortion services must satisfy certain reporting requirements. *Casey*, 112 S. Ct. at 2803. The plurality opinion of Justices O'Connor, Souter, and Kennedy abandoned the "strict scrutiny" approach used in *Roe*, thereby signaling that while a right to abortion apparently remains, the government no longer needs a compelling interest to restrict abortion before viability. Further, the burden of demonstrating that the restriction is constitutional appears to have shifted to the woman, who must show that the restriction is "unduly burdensome." *Id.* at 2791.

177. *Id.* at 2842-43 (Stevens, J., concurring in part and dissenting in part).

178. *Id.* at 2847-49 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The different conclusions reached by the plurality and Justice Stevens in the application of the undue burden test demonstrate the difficulty the Court will have in applying the test in the future. There appears to be no consistent principle to guide any future application of the test.[179] Conservative justices can use the test to uphold all restrictions on abortion short of a complete ban, while liberal members can use it to strike down any restriction that would have been invalidated under the *Roe* framework. If the undue burden standard is to have any meaning, the Court will have to find a way to apply it with sensitivity and neutrality.[180]

While four members of the *Casey* Court would have overruled *Roe*,[181] the majority expressly chose to reaffirm "the essential holding" of *Roe*.[182] Although not much of *Roe* may survive without its trimester and strict scrutiny framework,[183] the Court used strong language to reinforce at least the pure right to abortion guaranteed by *Roe*.[184] In doing so, the Court emphasized both the importance of stare decisis, and the significance that *Roe* has had for women in this country.[185] Thus, despite its ambiguity, *Casey* was clear that states may not ban abortions before viability. Given the political climate both in the government and on the Court at the time, that makes *Casey* a striking and perhaps even courageous decision.

B. Donald Kommers: Communitarian Values Over Individual Rights

Donald Kommers has written extensively about the German abortion de-

179. The plurality tried to define "undue burden" but could do no better than equally imprecise and malleable concepts such as "substantial obstacle." *Id.* at 2821.

180. Laurence Tribe points out in this context that "unless the 'undue burden' test is applied with sensitivity to the circumstances of actual women in the real world, many burdens that from an Olympian judicial perspective might appear to be molehills are in fact massive obstacles to choice." LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 250 (1992). He cites as particularly unrealistic the plurality's finding that the 24 hour waiting period imposed on women in Pennsylvania was not unduly burdensome. Even the district court had found the waiting period "particularly burdensome" for women who could not afford to travel long distances twice, to pay for motels, or to be away from home or work. *Id.* at 249. The district court noted that women in 62 of Pennsylvania's 67 counties were required to travel at least an hour to obtain an abortion. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *cert. granted in part*, 112 S. Ct. 931, *aff'd in part, rev'd in part, and remanded*, 112 S. Ct. 2791 (1992).

181. 112 S. Ct. at 2855 (Rehnquist, C.J., with whom White, Scalia, and Thomas, JJ., joined, concurring in the judgment in part and dissenting in part).

182. *Id.* at 2804. "[N]o change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it." *Id.* at 2812.

183. *See, e.g., id.* at 2883 (Rehnquist, C.J., with whom White, Scalia, and Thomas, JJ., joined, concurring in the judgment in part and dissenting in part).

184. *Id.* at 2811-12; *see also id.* at 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("All that remained between the promise of *Roe* and the darkness of the plurality was a single flickering flame.... But now, just when so many expected the darkness to fall, the flame has grown bright.").

185. The plurality noted that "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Id.* at 2812; *see also* TRIBE, *supra* note 180, at 255-56.

cision.[186] I will focus primarily on his article, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*,[187] because it is his most recent contribution to the subject and is representative of his other work. Kommers proceeds from the position that the delicate balance between communitarian and liberty values in American constitutional jurisprudence has dissolved, since *Griswold*, "into a new principle that exalt[s] liberty at the expense of sociality or community."[188] According to Kommers, *Roe* and the cases that follow it emphasize "man as an autonomous moral agent, unbounded and unbonded—a private being, a totally independent self. . . . The ideal society of the abortion cases is a society of individuals free of tradition."[189] *Roe* and the other cases are wrong because they take the idea of autonomy too far: "Liberty takes priority over duty, over fraternity, and over community."[190] In Kommers's view, communitarian values must be recaptured by the law: "Constitutional law would actually be truer to the human condition if it allowed friendship and fraternity to play a role in the abortion context before seeking to impose some spacious and abstract freedom of choice in the name of privacy."[191] Under the rubric of self-determination, American jurisprudence has lost its sense of moral rationality, which, Kommers contends, is only possible within a framework of familial and communal relationships. Community, and everything it stands for, must not be subordinated to liberty. In order to regain this synthesis, he turns to the 1975 German abortion decision.

The German abortion decision appeals to Kommers because it subordinates autonomy to other values. In Germany, the state is not neutral—it condemns "abortion for what it is, namely, 'an act of killing.' "[192] German legal doctrine is much more communitarian than the rights-based constitutionalism, which has taken hold of American law in recent years and which, as Kommers disapprovingly notes, considers "subjectivities—commitments, values, families, communities, customs, religions, and habits" irrational.[193] Rights-based theorists (and the Supreme Court) support, according to Kommers, a "public world of ideological neutrality, a world in which law has no role in personal morality, . . . effectively creating a world in which law cannot prefer chastity over prostitution."[194] In contrast, the German court recognizes the educative function of law. Far from being neutral, laws must express

186. *See supra* notes 9-10.

187. Kommers, *supra* note 9.

188. *Id.* at 376.

189. *Id.* at 403.

190. *Id.* at 405.

191. *Id.* at 407.

192. *Id.* at 397 (quoting Judgment of Feb. 25, 1975, BVerfG, 39 BVerfGE 1, 46).

193. Kommers, *supra* note 9, at 404.

194. *Id.* at 406. In this context Kommers quotes with dismay Justice Brennan's statement that "abortion and childbirth . . . are simply two alternative medical methods of dealing with pregnancy." *Id.* at 388 (quoting Beal v. Doe, 432 U.S. 438, 449 (1977) (Brennan, J., dissenting)).

approval or disapproval.[195]

Furthermore, German legal values emphasize the social nature of human beings:

> "The concept of man in the Basic Law is not that of an isolated sovereign individual; rather the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value."[196]

Autonomy, of course, is also important in German legal thought, but as reflected by Article 2(1) of the Constitution, individual liberty is always limited by rights of others.[197] Hence, in the abortion context, the woman's autonomy is limited by the fetus's right to life and the community's interest in pregnancies reaching term. In Kommers's opinion, the constitutional court correctly balanced the woman's autonomy interest against other, perhaps more significant, interests and achieved an equitable solution through the indications model of abortion regulation. This solution, argues Kommers, amounts to "a reconciliation of liberty and community that could well serve as a model for other constitutional courts, including the United States Supreme Court."[198]

C. Mary Ann Glendon

Glendon's comparative study of abortion laws in Europe and the United States focuses on three major themes: (1) the law serves a pedagogical function by providing society with moral ideals for which to strive; (2) compromises can be reached between the law's ideal and practical reality; and (3) social welfare laws benefitting women and children must be radically improved in the United States.

According to Glendon, the law sends moral messages to society. Relying on the teachings of anthropologist Clifford Geertz, she emphasizes that "law is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that a society makes sense of things."[199] The comparative perspective is instructive for this conception of law. According to Glendon, "[t]he idea that law might be educational, either in purpose or technique, is not popular among us. But on the European continent, older ideas about law somehow survived the demolition of classical political theory and have persisted, at least as undercurrents, into the modern age."[200] Glendon is particularly enthusiastic about the West German court's

195. Kommers, *supra* note 9, at 405.

196. *Id.* at 403 (quoting Judgment of July 7, 1970, BVerfG, 30 BVerfGE 1, 20).

197. For text of Article 2(1), see *supra* note 43.

198. Kommers, *supra* note 9, at 399.

199. GLENDON, *supra* note 9, at 8 (citing CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 175 (1983)).

200. GLENDON, *supra* note 9, at 7.

moral stand in the 1975 abortion decision: "Throughout its lengthy opinion, the West German court appears to have accepted a view of criminal law as a way of affirming the moral order of society and as an embodiment of ideals of right conduct."[201] In Glendon's view, the German conception of law, particularly in the area of abortion, is superior to the *Roe* framework of "neutrality" because it sends moral messages to society and informs social thinking and behavior.

Glendon also applauds the German decision and the subsequent legislative response because she believes they represent a willingness to reach a political compromise on a difficult issue, which she finds lacking in the United States.[202] According to Glendon, public opinion polls consistently show that the majority of Americans believe neither that there should be a total ban on abortions, nor that abortions should be available on demand during the first trimester, as under *Roe*.[203] The situation therefore appears ripe for political compromise beyond the "rigid and impoverished"[204] positions of the current debate. Glendon contends that Germany achieved such a compromise. Instead of cutting off debate and bringing "potentially creative and collaborative processes"[205] to a halt, as *Roe* did in constitutionalizing abortion regulation, the German court created a solution that recognized the moral significance of the issue but still allowed women to obtain abortions if absolutely necessary. Glendon acknowledges that the German court substituted its own values for those of the legislature (as the *Roe* Court was accused of doing[206]), but believes it left the legislature with "considerable room to devise, and in the future, if it wishes, to revise, abortion policy."[207]

More significantly for Glendon, the values promoted by the West German court differed significantly from those of the *Roe* Court. The West German court asked under what circumstances it might be permissible to take human life; it viewed life as a value to the community as well as to the fetus. In other words, the court emphasized "the connections among women, developing life, and the larger community,"[208] rather than focusing simply on individual women, privacy, and autonomy, as the Supreme Court did. Instead of being exclusive, the German decision was inclusive—creating an atmosphere more conducive to compromise.

Glendon is convinced that compromise would have resulted in a better solution in this country as well. She believes that the abortion statutes likely to have emerged in state legislatures would have generally allowed women to

201. *Id.* at 29.
202. *Id.* at 40.
203. *Id.* at 40-42. For more information on polls, see Karen L. Bell, *Toward a New Analysis of the Abortion Debate*, 33 ARIZ. L. REV. 907, 909-13 (1991).
204. GLENDON, *supra* note 9, at 39.
205. *Id.* at 45.
206. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937-43 (1973).
207. GLENDON, *supra* note 9, at 34.
208. *Id.* at 35.

terminate their pregnancies early while prohibiting abortions later in pregnancy.[209] Perhaps this would not be an ideal solution for either side, but as the European perspective has shown, it could present an adequate compromise: "[R]eplacing the right to abortion with a compromise should help to replace strident discord with reasoned discussion about the grounds and conditions under which abortion might be permitted."[210]

Unlike Kommers, who largely ignores the issue, Glendon makes the improvement of social welfare laws a central part of her argument. Again, the example of Germany is instructive. Glendon notes that unlike the United States, where the government communicates to society that poor children and their families are "undeserving of assistance,"[211] Germany sends a message that the welfare of each child is a matter of utmost concern to the state through the existence of generous maternity and child welfare laws. Abortion regulation in Germany is part of the social welfare framework. Under the German framework, abortions should be necessary only when the welfare system has somehow broken down. Glendon agrees with this approach and urges that if American states are "once again to restrict the availability of abortion and to affirm the value of unborn life, [they] should in all fairness strive to help those who bear and raise children, not only during pregnancy but also after childbirth."[212] In Glendon's view, the appropriateness of abortion regulation should be judged, as it is in Germany, on the principle that "what the pregnant woman can be required to sacrifice for the common value is related to what the social welfare state is ready and able to do to help with the burdens of childbirth and parenthood."[213]

In sum, Glendon is unhappy with the American abortion decisions because they do not reflect what the majority of Americans believe and do not play an educative role in American society. Rather than foreclosing debate on a divisive issue such as abortion, the Supreme Court should have allowed, in her view, the states to hammer out political compromises like the one reached in Germany. Glendon adds the caveat that any increase in abortion regulation should occur within the context of increased state protection of the welfare of women and children. Like Kommers, Glendon believes that the German approach to abortion regulation is instructive and could serve as a model for the future of American abortion law.

209. *Id.* at 60. Glendon does not offer much support for this proposition, although she does cite LYNN D. WARDLE & MARY ANN Q. WOOD, A LAWYER LOOKS AT ABORTION 135 (1982), for the suggestion that about half the states have adopted legislation restricting abortions in the third trimester. GLENDON, *supra* note 9, at 164 n.53.

210. GLENDON, *supra* note 9, at 60.

211. *Id.* at 55.

212. *Id.* at 53.

213. *Id.* at 39.

III
CRITIQUE OF GLENDON AND KOMMERS

The arguments of Glendon and Kommers fail for two reasons. First, the application or even emulation in the United States of the approach articulated in the 1975 German decision is impossible because of fundamental differences in the legal, social, and political systems of the two countries. Second, even if application of the decision's rationale was possible, such application would be undesirable for two reasons. The 1975 German decision is flawed and internally inconsistent and thus does not provide a more principled alternative to *Roe* in the area of abortion regulation. Also, support of the German decision by Kommers and Glendon should be regarded with skepticism because it appears to be driven more by a personal anti-abortion agenda than by any objective use of the comparative method.

A. Practical Difficulties in the Application of the German Decision to the United States

1. Positive and Negative Constitutional Rights

In advocating the emulation of the West German abortion decision, Kommers and Glendon ignore the inapplicability of the principles of that decision to the American legal and social landscape. They fail to consider adequately the differences between the constitutional systems in Germany and the United States. The United States is a nation of negative rights. As Judge Richard Posner has written, "[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."[214] Constitutional history supports the theory that, at least originally, the Constitution was designed as a document protecting individuals from the state, rather than conferring certain rights to state action.[215] In recent years, the Supreme Court has frequently refused to interpret the Constitution as conferring affirmative rights. For example, in *Dandridge v. Williams*,[216] the Court held that the state has no constitutional duty to provide minimal welfare for its citizens,[217] and in *San Antonio School District v. Rodriguez*,[218] the Court declined to recognize education as a fundamental constitutional right.[219]

214. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

215. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865 (1986) ("The ratification debates and the preamble to the resolution proposing the Bill of Rights contain repeated references confirming Madison's explanation that the Bill of Rights was designed to protect against 'abuse of the powers of the General Government,' and in particular to limit the powers of Congress.") (quoting 1 ANNALS OF CONG. 449 (Joseph Gales ed., 1789)).

216. 397 U.S. 471 (1970).

217. *Id.* at 487.

218. 411 U.S. 1 (1973).

219. *Id.* at 38-39:

> The present case . . . is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally

In *DeShaney v. Winnebago City*[220] the Court clarified its views on the subject of affirmative constitutional rights. Joshua DeShaney was terribly beaten and permanently injured by his father. Over a period of time, local social service workers received recurrent reports of physical abuse by Joshua's father. The social workers noted the boy's injuries but took no action in the case. When the boy was four years old, he was beaten so severely that he suffered permanent brain damage. An action was brought by the boy and his mother claiming that the state had deprived him of his right to liberty in violation of due process.[221] In refusing to recognize, under the Fourteenth Amendment, an affirmative right to protection by the state, the Court noted: "[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[222]

In contrast, the German Constitution explicitly guarantees citizens certain positive rights. Article 1(1), for example, states that the "dignity of man shall be inviolable" and commands that "[t]o respect and protect it shall be the duty of all state authority."[223] Few rights in the German Constitution are formulated in the negative language of the United States Constitution.[224] Instead, the German Constitution asserts the affirmative existence of rights such as life,[225] liberty,[226] human dignity,[227] and equality,[228] without reference to

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protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered," with the free exercise of some such fundamental personal right or liberty. . . . [T]he thrust of the Texas [education] system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts . . . .

220. 489 U.S. 189 (1989).

221. *Id.* at 191-93.

222. *Id.* at 196. The Court also stated that

nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.

Id. at 195. In a few circumstances the Court has read the Constitution to impose affirmative duties of care on the state but only for people who are in the custody of the state against their will. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982) (holding that a mentally retarded person involuntarily committed to a state institution has substantive due process rights to reasonably safe conditions, freedom from restraint, and adequate training); Estelle v. Gamble, 429 U.S. 97 (1976) (holding that state is required to provide adequate medical care to incarcerated prisoners); Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam) (holding that states must protect the right of prisoners to reasonable access to courts by providing them with law libraries).

223. GG art. 1(1), *translated in* BASIC LAW, *supra* note 36, at 14.

224. *But see, e.g.*, Article 12(2): "No specific occupation may be imposed on any person except within the framework of a traditional compulsory public service that applies generally and equally to all." GG art. 12(2), *translated in* BASIC LAW, *supra* note 36, at 18.

225. GG art. 2(2), *translated in* BASIC LAW, *supra* note 36, at 14 ("Everyone shall have the right to life and to inviolability of his person.").

226. *Id.* ("The liberty of the individual shall be inviolable.").

227. GG art. 1(1), *translated in* BASIC LAW, *supra* note 36, at 14 ("The dignity of man shall be inviolable.").

whether or not parliament can infringe upon those rights. Article 1(3) states that "[t]he following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law."[229] One interpretation of this provision is that the basic rights give rise to the government's duty to protect those rights, as well as the duty not to infringe upon them.[230] These fundamental rights guaranteed in the German Constitution should be understood as "norms comprising objective values which the State has to respect and to bring forward, especially by legislation."[231] In effect, the Constitution represents "the binding basis for the entire policy of the State."[232] The articles in the German Constitution instructing the government to protect certain important social institutions, such as marriage, family, and education, are a clear expression of these norms.[233]

Finally, Kommers is correct that the German constitutional system is more focused on community rights than on individual rights.[234] Individual rights protected by the state are to be exercised only in accordance with general community standards.

> To secure the liberty of all, the constitution provides legal possibilities to limit individual rights in favour of others and in favour of the community if this is necessary to enable it to perform its protective function. The idea of the individual underlying the Basic Law is not that of an isolated sovereign individual; instead, the Basic Law has decided the conflict between the individual and society in the sense of an individual based on society and tied to society without, however, affecting the individual's intrinsic value.[235]

This emphasis on community is particularly visible in the privacy context. Whereas the American conception of privacy is based on Justice Brandeis's formulation of privacy as the right to be left alone,[236] the German Constitution takes an affirmative view of privacy. As Glendon points out, the German view "stresses and makes clear what this freedom is for."[237] Essen-

228. GG art. 3(1), *translated in* BASIC LAW, *supra* note 36, at 14 ("All persons shall be equal before the law.").

229. GG art. 1(3), *translated in* BASIC LAW, *supra* note 36, at 14.

230. Eckart Klein, *The Concept of the Basic Law*, *in* MAIN PRINCIPLES OF THE GERMAN BASIC LAW 15, 19 (Christian Starck ed., 1983). *But see* Currie, *supra* note 215, at 869 ("The express provision that the rights listed [in the German Constitution] are binding on all organs of government seems to exclude any inference that they also apply directly to the actions of private parties.").

231. Klein, *supra* note 230, at 19.

232. *Id.* at 20.

233. GG art. 6(1), *translated in* BASIC LAW, *supra* note 36, at 15 ("Marriage and family shall enjoy the special protection of the state."); GG art. 7(1), *translated in* BASIC LAW, *supra* note 36, at 15 ("The entire educational system shall be under the supervision of the state.").

234. Kommers, *supra* note 9, at 395-96.

235. Klein, *supra* note 230, at 18; *see* GG art. 2(1), *supra* note 43.

236. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

237. GLENDON, *supra* note 9, at 37; *see also* Madelyn Wessel & Phyllis Segal, Book Review, 8 PROB. L.J. 349, 356 (1988) (reviewing GLENDON, *supra* note 9).

tially, the German right to privacy is defined as the right to develop one's personality within the community without violating the rights of others or the constitutional order.[238] It is clear from the German court's balancing test[239] that the German abortion decision relies on this communitarian-based concept of privacy.

The negative-positive rights distinction between the United States and Germany is not as stark as it may seem from this general discussion. One scholar argues, for example, that throughout its history the United States Supreme Court "has found in negatively phrased provisions constitutional duties that can in some sense be described as positive."[240] Similarly, the German Constitution is a hybrid of positive and negative rights.[241] My point is only that the United States Constitution remains essentially one of negative rights. The German abortion decision,[242] however, is based on the idea that the state has an affirmative duty to enforce a constitutional right against an individual, which is substantially a positive rights conception. While recognizing that the German abortion decision is anchored in the Constitution's positive right to life clause,[243] neither Kommers nor Glendon offers a way, short of a major restructuring of our constitutional system, of directly applying the German framework to the United States.

2. *Social Welfare*

The fact that Germany's social welfare laws are far more expansive than those of the United States makes emulation of the German decision even less plausible. Article 20 of the German Constitution states that Germany "is a democratic and social federal state."[244] While this provision may seem merely descriptive, it has led to the creation of a wide-ranging social service net that includes minimum welfare rights, a national health care system, and free public education through the university level. This constitutional principle of the social state (*Sozialstaatsprinzip*) serves primarily as guidance for legislators.[245] It obliges the state to provide tolerable living conditions for all people in need. It also requires the state to work toward the improvement of living conditions

238. *See* GG art. 2(1), *supra* note 43.

239. *See supra* text accompanying notes 60-69.

240. Currie, *supra* note 215, at 886.

241. For an argument against a positive reading of rights in the Basic Law, particularly of social rights, see Christian Starck, *Constitutional Definition and Protection of Rights and Freedom*, *in* RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW ACCORDING TO THE GERMAN BASIC LAW 19, 40-44 (Christian Starck ed., 1987).

242. Judgment of Feb. 25, 1975, BVerfG, 39 BVerfGE 1.

243. GG art. 2(2), *supra* note 36.

244. GG art. 20(1), *translated in* BASIC LAW, *supra* note 36, at 23.

245. This term is a creation of constitutional theory, derived from the interpretation of GRUNDGESETZ art. 20(1), 28(1). *See* Kommers, *supra* note 32, at 247; Philip Kunig, *The Principle of Social Justice*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 18 (Ulrich Karpen ed., 1988). Article 28(1) reads: "The constitutional order in the Laender [states] must conform to the principles of republican, democratic and social government . . . ." GG art. 28(1), *translated in* BASIC LAW, *supra* note 36, at 25.

for all people and to seek an equal distribution of entitlements for all. Legislators, however, have great flexibility in deciding how to realize these goals.[246]

The idea of social insurance and welfare rights began in Germany during the 1880s and has evolved since then into a complex system of rights and benefits.[247] In 1970, a commission was established to codify and systematize social legislation.[248] The result was West Germany's Social Code, which became law in 1976.[249] The goal of the Social Code is to "provide for social benefits, including social and educational assistance, with the object of making a reality of social justice and social security."[250] The preamble specifically includes the aim of "protecting and encouraging the family."[251] The Code encompasses both social insurance, which primarily consists of private, though nationalized, health insurance,[252] and social assistance. Social assistance, which is generally provided by the state depending on need, includes housing subsidies, youth assistance, and education subsidies.[253] The state also provides certain benefits that are not dependent on need. These include family subsidies, generous maternity leave, and child support.[254]

Even though the Constitution does not specify what social legislation must be enacted and who must be protected, Germany is clearly a social welfare state. Most laws are "impregnated with a welfare state character."[255] This influence is particularly apparent in the area of family legislation. The government provides substantial assistance for children, including youth subsidies and educational grants, to all families. In fact, marriage and family are among the few substantive areas singled out in the Constitution for explicit protection by the state.[256]

The abortion decision of 1975 was fully anchored in the social legislation existing in West Germany at the time. In fact, the constitutional court made several directives to the legislature to provide all the assistance to mother and

246. *See* WOLFGANG GITTER, SOZIALRECHT 28 (1986). Since the decision of how to implement the principle of the social welfare state is left to the legislature, the constitutional court has repeatedly refused to entertain individual claims of inadequate social assistance. *Id.*

247. *Id.* at 13-20.

248. *See* Detlev Karsten, *Economic and Social Policy*, *in* POLITICS AND GOVERNMENT IN THE FEDERAL REPUBLIC OF GERMANY: BASIC DOCUMENTS 261, 273 (Carl-Christoph Schweitzer, Detlev Karsten, Robert Spencer, R. Taylor Cole, Donald P. Kommers & Anthony Nicholls eds., 1984).

249. 1975 BGBl. I 3015, *translated in* Karsten, *supra* note 248, at 271-72 (translating entire Social Code).

250. 1975 BGBl. I 3015, *translated in* Karsten, *supra* note 248, at 271-72.

251. 1975 BGBl. I 3015, *translated in* Karsten, *supra* note 248, at 272.

252. 1975 BGBl. I 3015. Social insurance is guaranteed to every citizen regardless of financial status. Hence, premiums are based on risk rather than ability to pay. The scheme is financed by employers, employees, and government assistance. Insurance generally covers traditional health, and also accidents, pensions, maternity, etc. In addition, Germans have the option of purchasing entirely private insurance. *See* GITTER, *supra* note 246, at 3-4.

253. Karsten, *supra* note 248, at 273.

254. GITTER, *supra* note 246, at 232-37.

255. Starck, *supra* note 241, at 44.

256. *See* GG art. 6, *supra* note 58.

child necessary to make pregnancies and motherhood as easy as possible.[257]

The United States, in contrast, has no social state provision in its Constitution, and its social welfare laws are considerably less developed than those of Germany. Glendon writes that "we lag behind the countries to which we most often compare ourselves in the benefits and services we provide to mothers and to poor families, and in the imposition and collection of child support obligations."[258] Paid maternity leave, for example, is not required by federal law[259] and is not available to most working women. Even where available under state law, paid leaves usually expire after only eight weeks.[260] In Germany and most other European countries, maternity leaves are paid for six months. Mothers often are granted unpaid leave for an additional year with full benefits and job security.[261] In addition, while day care for children between the ages of three and five is included in the German public school system, it is rarely provided in the American school system.[262] Furthermore, the 1992 German abortion law guaranteed kindergarten schooling and free contraception for minors.[263]

In the United States, the only comprehensive state support for children is Aid to Families with Dependent Children (AFDC) and food stamps. These programs are not enough, however, in any state, to bring a family above the poverty line.[264] Similarly, while Germany guarantees a specified level of child support by advancing payments and then collecting from the absent parent, less than half of eligible mothers in the United States receive full support and 24 percent receive nothing from the noncustodial father.[265] It should come as

257. "It is therefore the task of the state to employ, in the first instance, social, political, and welfare means for securing developing life." Judgment of Feb. 25, 1975, BVerfG, 39 BVerfGE at 44, *translated in* Gorby & Jonas, *supra* note 7, at 644.

> [T]he state will also be expected to offer counseling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to continue the pregnancy, and especially in cases of social need—to support her through practical measures of assistance.

Id. at 50, *translated in* Gorby & Jonas, *supra* note 7, at 649.

258. GLENDON, *supra* note 9, at 53.

259. In February 1993, President Clinton signed the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of 2 U.S.C., 5 U.S.C., and 29 U.S.C.), which had been vetoed twice by his predecessor, President Bush. While the new law requires employers to give their employees up to 12 weeks leave to attend to a birth, adoption, or serious illness affecting themselves or a close family member, the leave is unpaid. In addition, the bill applies only to businesses of more than 50 employees and federal, state, and local governments. Adam Clymer, *Congress Passes Measure Providing Emergency Leaves*, N.Y. TIMES, Feb. 5, 1993, at A1.

260. GLENDON, *supra* note 9, at 54 (citing Sheila B. Kamerman, *Child-Care Services: A National Picture*, 106 MONTHLY LAB. REV. 35, 39 (1983).

261. GLENDON, *supra* note 9, at 54.

262. *Id.*

263. *See supra* note 118 and accompanying text.

264. *See* Alfred J. Kahn & Sheila B. Kamerman, *Child Support in the United States: The Problem*, *in* CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL POLICY 11 (Alfred J. Kahn & Shelia B. Kamerman eds., 1988).

265. Kahn & Kamerman, *supra* note 264, at 10, 15.

no surprise then, that in Germany the abortion decision might "appear in a somewhat different light than it would to a woman in a country that does not provide such extensive income redistribution in favor of families with dependent children."[266]

The constitutional court's abortion decision relies on the fact that the social net in Germany will take care of women who must carry unwanted pregnancies to term. Poor women have the same rights as rich women to receive prenatal and postnatal medical care and social assistance.[267] Glendon recognizes that legislation prohibiting abortion must coexist with social welfare laws that provide assistance to pregnant women. Some of her greatest admiration for the German system is reserved for Germany's social service net, and she is keenly aware of the deficiencies in the American social welfare system.[268] Glendon does not, however, adequately address the wisdom of looking to the German abortion ruling in the absence of such welfare laws in the United States. As long as stricter regulation of abortion in this country is not accompanied by legislation offering help to pregnant women and mothers, Glendon's argument that the German decision provides a morally and socially superior alternative to *Roe* does not distinguish itself from the more standard anti-abortion arguments.[269]

Unlike Glendon, Kommers largely ignores the significance of social welfare laws. While acknowledging that the United States "is not a Sozialstaat,"[270] he dismisses the differences in the social welfare laws between the United States and Germany: "[T]he abortion agenda was created not by persons or organizations representing the poor, but by the medical profession, middle-class feminists, and allies in the judicial establishment unconcerned with values of commitment and responsibility in personal relations."[271] However, the degree to which social services such as education about contraception, free prenatal and postnatal care, and psychological counseling for pregnant women would affect the abortion rate is an important issue and cannot be dismissed so easily. Kommers does not face the question of how the German abortion decision, or the rationale behind it, could realistically be implemented in the United States.

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266. GLENDON, *supra* note 9, at 54-55.

267. *See* discussion of German health care, *supra* note 252.

268. *See supra* notes 211-13 accompanying text.

269. I am not suggesting that if the United States had social welfare laws similar to those in Germany, I would approve of stricter regulation of abortion. My point is merely that even from Glendon's perspective, her interest in the German decision as a model for American abortion regulation does not make sense without concurrent increases in social welfare legislation, which seems unlikely.

270. Kommers, *supra* note 9, at 405.

271. *Id.*

B. *Philosophical Difficulties in the Application of the German Decision to the United States*

Even if the German decision could be implemented under the existing constitutional and social welfare structure of the United States, doing so based on Glendon's and Kommers's arguments would not be intellectually sound. First, the 1975 decision fails to resolve many of the problems Glendon and Kommers identify with the *Roe* line of cases. Second, the comparative analyses offered by Glendon and Kommers are not persuasive because they appear to be motivated more by an anti-abortion agenda than by neutral reasoning.

1. *Flaws in the German Decision*

Glendon and Kommers criticize *Roe* for being unprincipled: Kommers because it exalts liberty over duty and community,[272] and Glendon because it closes off potential compromises.[273] Both Glendon and Kommers maintain that the German abortion decision is legally and morally superior to *Roe*. I suggest, however, that the German decision is no more principled than *Roe* and indeed may be more problematic.

As noted earlier, the majority opinion in the 1975 German abortion decision provoked a sharp and rare dissent by two members of the court.[274] The dissent advanced three arguments against the majority opinion. The most compelling was the dissenters' claim that the court had overstepped its role as judicial reviewer and imposed its own legislative judgment on the German parliament.[275] For the first time in German postwar history, the constitutional court had ordered the state to intrude into the private sphere of the individual against the will of the representative body.[276] The dissenters argued that the language of the Constitution simply does not support an affirmative duty of the state to punish and to impose criminal sanctions.[277] The purpose of constitutional review by the court is to protect individuals from the excesses of state power.[278] While the Constitution allows the state to use criminal sanctions to enforce laws, the higher goal of the basic rights is not to require the use of state power but to limit it.[279] Since the Constitution does not re-

272. *See supra* note 190 and accompanying text.

273. *See supra* note 202 and accompanying text.

274. *See supra* note 48 and accompanying text.

275. Judgment of Feb. 25, 1975, BVerfG, 39 BVerfGE 1, 69-70 (Rupp-v. Brünneck and Simon, JJ., dissenting).

276. *Id.* at 73. This also sets the German decision apart from anything the United States Supreme Court has done. David Currie notes that

> the court focused upon the government's inaction and took the step that Judge Posner, and our Supreme Court in the abortion-funding cases, refused to take: it interpreted a provision recognizing a right to life against government as imposing an affirmative duty to protect life from menaces not of the government's making.

Currie, *supra* note 215, at 869-70.

277. 39 BVerfGE at 70.

278. *Id.*

279. *Id.* at 73. The dissent then cited to Roe v. Wade, 410 U.S. 113 (1973). 39 BVerfGE at 74.

quire the use of criminal sanctions to protect life, the dissent reasoned that the majority was imposing its own remedy, its own means, to achieve the desired end.[280] This blatant expansion of the court's own power directly violated the principle of judicial self-restraint, which serves as one of the only legitimizing aspects of judicial review.[281]

In addition to the objection that the majority was legislating, the dissent disagreed with the majority's interpretation of the legislative history of Articles 1(1) and 2(2) of the German Constitution.[282] The dissent found no indication in the legislative history that the Constitution's drafters intended to force the state to protect unborn life via criminal sanctions.[283] Rather, the legislative history reveals a determination by the drafters to leave the decision to punish to the legislature.[284] Similarly, the dissent protested the majority's use of the Nazi past, finding it disingenuous to compare the Nazi state's forced abortions in the context of its racist ideology to an individual woman's voluntary decision to obtain an abortion now.[285] Article 2(2) was a reaction to the mass extermination of human lives during the Holocaust, forced sterilization, and forced euthanasia—all actions by the state against individuals.[286] Moreover, an examination of abortion laws during the Nazi period reveals that while some women were forced to have abortions, most German women who had abortions and the doctors who performed them were sentenced to hard labor for violating laws for the protection of marriage, family, and motherhood.[287] If the abortion "injured the vitality of the German people," by destroying an Aryan fetus, the sentence was death.[288] The dissent argued that perhaps what the Nazi past really teaches is that Germany should be careful with overzealous prosecutions as a method of controlling women's reproductive choices.[289]

Finally, the dissent criticized the majority for ignoring the burden its decision placed on the pregnant woman and for downplaying the special relationship that exists between woman and fetus. The majority required not only the cessation of behavior by the "perpetrator," as usually occurs in criminal cases, but also affirmative behavior—carrying the fetus to term.[290]

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280. 39 BVerfGE at 69-70.

281. *Id.* at 67.

282. *Id.* For the text of these articles, see *supra* note 36.

283. 39 BVerfGE at 75.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*; *see also* Bock, *supra* note 22 (discussing the relationship between forced sterilization, forced abortion, and compulsory child-bearing during the Nazi period).

288. 39 BVerfGE at 77, *translated in* Gorby & Jonas, *supra* note 7, at 670.

289. 39 BVerfGE at 77; *see also* Gerhard Amendt, *Einige Blinde Flecken in der Abtreibungsdebatte Oder: Drei Fragen [Some Blind Spots in the Abortion Debate; Or, Three Questions]*, NEUE KRIMINALPOLITIK, Aug. 1991, at 32, 34 ("as if the way contemporary women choose to live their lives has something to do with the governmental abortion policies of National Socialism") (author trans.).

290. 39 BVerfGE at 79.

In addition to the flaws in legal reasoning, the German decision fails to achieve the other virtues claimed by Glendon and Kommers. Glendon, in particular, complains that *Roe* cut off a "conversation" about abortion, preventing compromises from being hammered out in legislatures all over the country.[291] She points to the German decision as facilitating such conversation and making compromise possible. Yet the German court, by instituting its own views, prevented further compromise from occurring. As a result of the decision, the Bundestag was limited to employing criminal sanctions to protect life. While the United States Supreme Court used its power to keep the state out of the private sphere, the German court used its power to force the state into the private sphere. As the history of abortion regulation in Germany since 1975 has shown, the 1975 decision resulted in a situation in Germany far from the "ideal compromise"[292] praised by Glendon and Kommers. Rather than finding a morally defensible solution to a difficult problem, as Kommers and Glendon claim it did, the constitutional court created a hypocritical system in which most women in the northern states could obtain abortions easily through the use of the social indication, while women in the southern states faced the risk of being dragged to court to explain their reasons for seeking an abortion, as the Memmingen trial in 1989 showed.[293] And many Germans were clearly not comfortable with the "compromise" at the time of unification in 1990, when the debate around the abortion issue threatened unification.[294] Finally, as the 1993 abortion decision[295] demonstrates, even the constitutional court was not comfortable with the compromise of 1975. The geographic disparities in access to abortion and the political and judicial rebalancing suggest that the compromise struck by the court in 1975 was neither stable nor moral, much less ideal.

Finally, the belief of Glendon and Kommers in the moral superiority of the German approach rests on a shaky foundation.

> If a fetus more than fourteen days old is human life, then how is our moral landscape enriched by permitting its destruction for any other than the most severe grounds, namely a direct threat to the life of the mother? In a country which treated certain "forms of life as worthless," is a better message sent by a decision which first affirms the supreme value of human life and then characterizes it as terminable when balanced against interests which include anything *less* than a direct threat to the life of the mother?[296]

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291. GLENDON, *supra* note 9, at 62; *see also supra* note 202-05 and accompanying text.

292. GLENDON, *supra* note 9, at 40; Kommers, *supra* note 9, at 399. Kommers and Glendon do not actually use the term *ideal compromise.* Since both rely on the notion of compromise for their arguments, however, I use the term ironically.

293. *See* discussion *supra* notes 87-90 and accompanying text.

294. *See supra* notes 93-100 and accompanying text.

295. Judgment of May 28, 1993, BVerfG, 88 BVerfGE 203; *see supra* notes 121-41 and accompanying text.

296. Wessel & Segal, *supra* note 237, at 356.

What is the positive educative and moral effect of a law that teaches that even though abortion is wrong and immoral, the state will turn a blind eye if the woman can convince a doctor that the pregnancy is causing her hardship? The 1993 abortion decision, which made abortion illegal, but then allowed women to "break" the law without fear of punishment during the first trimester,[297] further weakens the argument that the 1975 decision can serve as a moral teacher.

2. *Glendon's and Kommers's Motivations*

Both authors suggest that through their comparative analyses of the German abortion decision, they are forwarding a new, unbiased alternative to abortion regulation in the United States. Glendon writes, for example, that "[o]ne of the aims of this book is to make a case for wider attention to and greater use of comparative legal analysis, by showing how awareness of foreign experiences can illuminate our own situation and contribute in a modest way to our own law reform efforts."[298] Similarly, Kommers hopes that his article will "demonstrate the fertility of a comparative approach to constitutional law."[299]

What exactly the comparative method entails, of course, is interpreted differently by different people.[300] Rudolf Schlesinger defines it as "a way of looking at legal problems, legal institutions, and entire systems. By the use of that method it becomes possible to make observations, and to gain insights, which would be denied to one who limits his study to the law of a single country."[301] At least historically, the comparativist has been viewed more as a neutral, detached observer—more like a historian and a scientist than an advocate.[302] Otto Kahn-Freund, one of the premier early comparativists, noted in 1965:

> One of the virtues of legal comparison (which it shares with legal history) is that it allows a scholar to place himself outside the labyrinth of minutiae in which legal thinking so easily loses its way and to see the great contours of the law and its dominant characteristics .... [The comparativist gains a] detached view not only of foreign systems, but also, through the study of those systems, [of his own].[303]

It would, of course, be naive to claim that comparative law can be entirely

297. *See supra* notes 131-37 and accompanying text.

298. GLENDON, *supra* note 9, at 3.

299. Kommers, *supra* note 9, at 374.

300. *See, e.g.*, Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 1-6 (1991) (discussing the aims of comparative law).

301. RUDOLF B. SCHLESINGER, COMPARATIVE LAW: CASES, TEXT, MATERIALS 1 (4th ed. 1980).

302. For a discussion analogizing comparative law to scientific, and thus more objective research, see *id.* at 41-45.

303. OTTO KAHN-FREUND, COMPARATIVE LAW AS AN ACADEMIC SUBJECT 1, 3 (1965).

objective. Nonetheless, in order to maintain legitimacy, comparativists, like historians, must attempt to remain unbiased in their observations and neutral in their analyses.

Glendon and Kommers claim that they are using comparative analysis simply to shed light on a difficult problem, but their motivations lie elsewhere. A closer analysis of their work suggests first that Kommers is actually following a traditional pro-life agenda in his arguments and that his suggestions of neutrality should therefore be viewed with skepticism and second that, while Glendon's theories about political compromise and social welfare may sound evenhanded and thus seductive, she ignores several negative practical effects of her position because she is enthralled by the ideological outcome of the decision.

a. Donald Kommers

Several passages in Kommers's article on the 1975 German abortion decision offer insights into his true motives for engaging in his comparative study of abortion law. For example, he quotes approvingly from a "seminal"[304] article by Robert Rodes:

> [P]ersons benefiting most from the erosion of sexual standards are those "who are better able to derive satisfaction from organizational and technical accomplishments than from personal relations, middle-aged men who can afford to trade their wives in on expensive new models, and young people who have never had the occasion to learn about deferred gratification." This is the class on whose behalf the Supreme Court speaks in the abortion cases.[305]

Kommers laments that the "cultural elite [has] set the tone of American society,"[306] and applauds the German decision for giving us "a richer concept of the human personality."[307] He believes that our "obsessive concern with freedom of choice"[308] actually hurts women more than it helps them: "Constitutional law would actually be truer to the human condition if it allowed friendship and fraternity to play a role in the abortion context before seeking to impose some spacious and abstract freedom of choice in the name of privacy."[309] Entirely absent from Kommers's article, however, is an understanding that this "abstract freedom of choice" is far from abstract for many women in this country. His conviction that the pro-choice movement is the result only of eroding sexual standards, and is otherwise quite removed from "most Americans,"[310] reveals his failure to understand the plight of women

304. Kommers, *supra* note 9, at 405.
305. *Id.* at 406 (quoting Robert E. Rodes, Jr., *Greatness Thrust Upon Them—Class Biases in American Law*, 28 AM. J. JURIS. 1, 4 (1983)).
306. *Id.* at 405.
307. *Id.* at 406.
308. *Id.*
309. *Id.* at 407.
310. *Id.* at 406.

without the right to choose.

Kommers is enamored by the concept of community, of sociality. He is attracted to a system where "values, tradition, religion, localism, or ideas of 'the good' " mean something.[311] By revealing this kind of world view, which can safely be called conservative or traditionalist, he abandons the so-called neutrality and objectivity of the comparative method. In his desire to use the German decision as a new set of arguments against abortion, he ignores the fact that the decision mandates legislative action, something that is difficult, if not impossible, to compel under the American constitutional system. In his paean to a community that values tradition, self-discipline, and religion, Kommers avoids addressing the fact that such a community should also provide mothers with child care, financial assistance, sexual education, and contraception, so that abortions would not be necessary in the first place. The German decision depends on the principle of the social state, but Kommers fails to address the question of why we should look to that decision in the absence of an adequate system of social welfare in this country.

Kommers uses the German decision to dress old anti-choice arguments in new clothing. Particularly disturbing is that by using comparative analysis, Kommers lends credibility and objectivity to arguments that possess neither. Under the pretense of arguing from a comparative perspective, Kommers makes the same arguments that for years have represented the pro-life side of the debate. That, I would suggest, greatly diminishes the strength of his argument (regardless of the position one takes on the issue of abortion).

b. Mary Ann Glendon

Glendon's position poses somewhat different problems. While she quotes approvingly Kommers's arguments about the distinction between autonomy versus community in the German abortion decision and in *Roe*,[312] she is more concerned with the undemocratic effect of *Roe*,[313] and the perceived failure of law to educate in this country.[314] She regards the German decision as having successfully forced the two sides to compromise: the German decision forcefully communicates "that abortion is a serious moral issue and that the fetus is entitled to protection"[315] while allowing women in true need to obtain abortions. Finally, Glendon feels that the social safety net upon which the decision is partly based is admirable and should be emulated in the United States.[316]

Unlike Kommers's, Glendon's arguments do not fall squarely on one side of the ideological debate surrounding abortion. Her critique of the *Roe* line of cases, as well as her praise of the German decision, is more subtle and more complex than is Kommers's. However, in the end, Glendon's arguments ap-

311. *Id.* at 404.
312. *See* GLENDON, *supra* note 9, at 35.
313. *See supra* notes 203-05 and accompanying text.
314. *See supra* notes 199-201 and accompanying text.
315. GLENDON, *supra* note 9, at 61.
316. *See supra* notes 211-13 and accompanying text.

pear to be similarly motivated by the outcome rather than the reasoning of the German decision. First, Glendon does not adequately address a chief complaint against the constitutional court's opinion—that the decision was no more "democratic" than *Roe* was. While acknowledging that both courts substituted their own values for those of the legislature, she approves of the German court's decision to do so because she agrees with the moral position that court took: "The problem is, which version of morality should prevail? The moral basis for preferring the values of toleration and freedom of choice when other important values are also at stake is beginning to seem increasingly unclear."[317] Glendon's defense of the German decision devolves into a reliance on that decision's presumed moral superiority. When much of Glendon's book criticizes *Roe* for cutting off compromise and being undemocratic, her response to a similar criticism of the German decision as not significant is unsatisfactory. To achieve an appearance of objective analysis, Glendon must do more than simply refer to the moral superiority of the values expressed by the German decision.

Second, it is questionable whether the regulation of abortion should be decided by politically motivated and shifting majorities in the legislature at all. One of the purposes of written constitutions is to insulate certain individual rights from majoritarian incursions. Laurence Tribe writes that "[t]he fatal flaw of this 'legislative solution' argument is that it presumes that fundamental rights can properly be reduced to political interests."[318] Glendon ignores the practical impact that a more "democratic" regulation of abortion would have on women, particularly poor women.

> [R]eturning abortion regulation to the states might not result in what Glendon deems an improvement in the moral messages conveyed by our abortion law. . . . [T]he resulting patchwork of state regulation might not provide any principled guarantee of fetal entitlements. Moreover, state regulation might continue to ignore both compassion and support for the pregnant woman. Compromise, in short, will not necessarily result in respect.[319]

Most likely, women who could afford the expense would travel from states restricting abortion to states that do not. Poor women, on the other hand, would be forced either to bear unwanted children in a system that provides neither free health care nor other necessary social benefits, or to have illegal and dangerous abortions. Unfortunately, Glendon does not address this problem.[320]

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317. GLENDON, *supra* note 9, at 36.

318. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1351 (2d ed. 1988).

319. Leslie P. Francis, *Virtue and the American Family*, 102 HARV. L. REV. 469, 486-87 (1988) (reviewing GLENDON, *supra* note 9).

320. Ironically, Germany has suffered this problem since the 1975 decision. Women trying to obtain abortions in Bavaria or Baden-Württemberg have been forced to travel abroad or to other parts of Germany. Morris, *supra* note 33, at A10. Obviously, there are economic

Glendon's discussion of social welfare laws is also problematic. Her position may sound appealing because she links her enthusiasm for the German decision to the existence of generous social laws geared to mothers, children, and families. She does not explain, however, why she still urges the adoption of the German court's reasoning and outcome despite the unlikelihood of a broad expansion of welfare laws in this country. Glendon does not specifically address whether she supports the application of the German decision in the United States without the presence of the German support network. This fact, as well as her decision to ignore the practical impact her proposal would have on poor women, render her arguments less appealing than they appear at first blush.

Glendon can also be faulted on her own terms for her admiration of a system that takes one position in theory and a different one in practice. She applauds the German court's clear moral stand against abortion, which she says serves an educative function, but at the same time notes with approval the fact that German women have little difficulty obtaining abortions in practice.[321] There is no doubt that law can play an important educative role in society, but this dichotomy between theory and practice seems to teach, as Professor Laurence Tribe notes, "mostly hypocrisy."[322] Referring to Glendon's praise of the French system of abortion regulation, he says:

> [T]he codification of a truly empty promise, one whose vision is belied by the people's day-to-day experience, one that is utterly at variance with the substance of the law in which it is contained, can take an unacceptably high toll on confidence in the rule of law and in the integrity of the legal system as a whole.[323]

While Kommers's argument for the German decision is expressly motivated by his own views on abortion, Glendon's reaches the same result, albeit with more subtlety. As Marie Ashe observes, "[Glendon's] work seems to reduce to an anti-abortion apologia distinguishable from more standard prolife expressions only in its sophistication and in its more liberal advocacy of certain social welfare politics supportive of family life."[324]

CONCLUSION

In this Article, I have examined the history of abortion regulation in West Germany, focusing in particular on the constitutional court's decision of 1975. I have laid out the problems of the decision itself and the effects it has had in Germany since 1975. Mary Ann Glendon and Donald Kommers con-

divisions between those who can afford to travel and thus obtain abortions and those who can not.

321. *See supra* notes 199-201 and accompanying text.

322. TRIBE, *supra* note 180, at 74.

323. *Id.* at 73-74.

324. Marie Ashe, *Conversation and Abortion*, 82 NW. U. L. REV. 387, 390-91 (1988) (reviewing GLENDON, *supra* note 9).

sider the German court's regulation of abortion a model for abortion regulation in the United States. I have argued that their reasoning is unpersuasive. Application of the German decision in the United States is impossible because of fundamental differences between the German and American legal and social systems, which Kommers and Glendon largely ignore or inadequately address. First, current constitutional jurisprudence in the United States could not support a Supreme Court decision requiring the imposition of criminal sanctions to support a moral position. Second, the absence of a social welfare system in the United States comparable to the one in Germany renders an application of the 1975 West German decision in the United States unworkable. The West German decision and subsequent German abortion laws have been thoroughly anchored in Germany's social system. While Glendon at least argues for abortion regulation in the context of the adoption of European social welfare laws (something that appears highly unlikely in the near future), Kommers entirely disregards the central importance of the social welfare support system to the West German decision. But without social welfare laws in the United States, lessons from the German decision do not appear particularly valuable.

In addition, application of the German decision would be morally and intellectually undesirable for three reasons. First, the 1975 decision is flawed both in legal reasoning and historical analysis. Second, the German court assumed the role of legislature, fashioning its own remedy to achieve the same goal the legislature had sought to achieve. In this respect, the German court was no better than the *Roe* Court and therefore does not present a superior methodological approach. Third, contrary to Glendon's and Kommers's views, the decision does not offer a superior framework for the regulation of abortion than *Roe* because there is no indication that the German decision has done more to protect fetal life than *Roe*. It has, however, done much to impede women's quest for autonomy.

Rather than seeking true compromise, Glendon and Kommers use the West German decision to advocate their own political stances on abortion. In the process of searching for a compromise solution on abortion, Glendon abandons women's autonomy rights in favor of intrusion and paternalism. Similarly, by lashing out at feminists and individualists, and by advocating generally for the kind of community values so favored by the Right in the United States, Kommers clearly places himself in the pro-life camp. In so doing, he reveals the motives behind his support of the West German decision. Kommers and Glendon do not propose new approaches to escape the quagmire of the American abortion debate. They simply offer old arguments hidden behind the cloak of neutral comparative analysis. For this reason their arguments for the adoption of Germany's framework are not convincing.